DEPARTMENT OF THE ARMY PAMPHLET 27–100–6

MILITARY LAW REVIEW

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C. Price 45 cents (single copy). Subscription Price: $1.75 domestic; 50 cents additional for foreign mailing.

HEADQUARTERS, DEPARTMENT OF THE ARMY OCTOBER 1959

PREFACE

This pamphlet is designed as a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army. At no time will this pamphlet purport to define Army policy or issue administrative directives. Rather, the *Military Law Review* is to be solely an outlet for the scholarship prevalent in the ranks of military legal practitioners. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes treating subjects of import to the military will be welcome and should be submitted in duplicate to the Editor, *Military Law Review*, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia. Footnotes should be set out on pages separate from the text, be carefully checked prior to submission for substantive and typographical accuracy, and follow the manner of citation in the *Harvard Blue Book* for civilian legal citations and *The Judge Advocate General's School Uniform System of Citation* for military citations. All cited cases, whether military or civilian, shall include the date of decision.

Page 1 of this Review may be cited as 6 *Military Law Review* 1 (Department of the Army Pamphlet No. 27-100-6, October 1959).

PAMPHLET
No. 27-100-6

HEADQUARTERS,
DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *1 October 1959*

MILITARY LAW REVIEW

PERSONAL SERVICE CONTRACTS*

BY LIEUTENANT COLONEL RUSSELL N. FAIRBANKS**

Personal services may not be obtained upon a contractual basis but are required to be performed by regular employees who are responsible to the Government and subject to its supervision. In view of the long history of this rule of Government procurement, its uncertainty is anomalous. This article attempts to examine the origin, present content, and probable future of the rule, and incidentally, to illuminate the relationship among the Congress, the Comptroller General, and the executive agencies charged with buying for the Government.

I. THE COMPTROLLER GENERAL

A. *His Authority*

The Comptroller General of the United States came to the procurement councils of the executive departments thirty-seven years ago upon the enactment of the Budget and Accounting Act of 1921. He was made the sole authority to "settle and adjust" all claims by and against the Government and all accounts in which the Government is concerned.[1] Balances certified by the General Accounting Office upon the settlement of public accounts are "final and conclusive upon the Executive Branch of the Government."[2] He may suspend items in an account to obtain further evidence or explanations.[3] It is the duty of the General Accounting Office to state and certify to the Treasury Department the account of any disbursing officer who fails to render his accounts in the manner and at the time required by law or regulations.[4] The General Counsel of the Department of the Treasury is author-

* This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the Sixth Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

** Chief, Procurement Law Division, Academic Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia; member of District of Columbia Bar; graduate of Columbia University Law School.

[1] Section 236, Revised Statutes, as amended (31 U.S.C. 71; M. L. 1949, sec. 1654).

[2] Section 8, act of 31 July 1894 (28 Stat. 207), as amended (31 U.S.C. 74; M. L. 1949, sec. 1656).

[3] *Ibid.*

[4] Section 3633, Revised Statutes, as amended (31 U.S.C. 514; M. L. 1949, sec. 1683).

ized and required to proceed against such a delinquent officer.[5] Disbursing officers or the heads of executive departments may request advance decisions from the Comptroller General upon any question involving a payment to be made by them or under them, which decision shall govern the General Accounting Office.[6]

The Comptroller General reserves the right to post audit administrative determinations of the need for goods and services and of the lawfulness of their purchase. "The primary function of the G. A. O. is to see to it that public funds are expended for the purposes for which appropriated by the Congress and in accordance with applicable law. Inherent in the performance of this function is the right and duty to determine the legal validity of payments made or claimed under Government contracts."[7]

The General Accounting Office need not make final determinations in advance on all payments made by the Government, but it does have "the right to post audit such payments."[8] That office has claimed sole authority to determine whether payments of public funds are authorized by law, and whether appropriated funds are available for such payment.[9] In a case involving differences among the Secretary of War, the Attorney General, and the Comptroller General as to the legality of a certain contract, the Court of Claims stated that although the Secretary of War was the authorized official to enter into the contract and to interpret the statute in question, "The fact is that, as an administrative matter, the Secretary could not pay unless the Comptroller approved."[10] In an early opinion to the President,[11] the Comptroller General characterized opinions of the Attorney General as "advisory only," not "controlling" on the General Accounting Office, and as "afforded no sanction . . . to disregard the decisions of the General Accounting Office." More recently, the Attorney General has felt himself obliged to seek the opinion of the Comptroller General as to the legality of a contract the Department of Justice contemplated awarding.[12] The Comp-

---

[5] *Ibid.*

[6] Section 8, act of 31 July 1894 (28 Stat. 207), as amended (31 U.S.C. 74; M. L. 1949, sec. 1653).

[7] Welch, *The General Accounting Office in Government Procurement*, 14 Federal Bar Journal 321 (1954).

[8] *Ibid.*

[9] 3 Comp. Gen. 545 (1924).

[10] *Graybar Electric Co. Inc.* v. *United States*, 90 Ct. Cl. 232, 244 (1940).

[11] 2 Comp. Gen. 784 (1923).

[12] 21 Comp. Gen. 400 (1941).

troller General will follow decisions of the Court of Claims only when "they are deemed correct expositions of the law."[13]

A casual review of the published decisions of the Comptroller General will illustrate the extent to which he participates in procurement affairs. His approval of proposed contract clauses has been sought and rendered.[14] Final decision whether inclusion in specifications of certain provisions unduly restricts competition or unnecessarily increases the cost of the product is his.[15] Whether specifications fairly and accurately state the minimum needs of the Government,[16] whether a bidder may be permitted to correct or withdraw his bid,[17] whether the bid of a contractor who had previously rendered unsatisfactory service and who delivered goods not in conformance with specifications shall be considered,[18] whether the facts of a particular case are such as to bring it within the scope of the First War Powers Act and the executive orders issued pursuant thereto,[19] and whether the ordering agency had need of the services it ordered,[20] are all within the jurisdiction of the Comptroller General.

B. *Recent Critical Analysis*

The Comptroller General has received his proportionate share of criticism. The point of that criticism seems to be not that the functions he performs should not be performed, but that he is not the appropriate officer to perform them. In a separate statement, Hoover Commissioner James H. Rowe, Jr., wrote:

> "An administrator must get results. He is expected to get them—by the President, by the Congress, and by the country. The objects of administrators and of auditors differ. They are trained differently; their experience and background are different; their aims are different. It is no wonder that they are so often in controversy. This controversy is inevitable so long as the auditor, who is not held responsible for results, retains control over the agency head who must try to get effective results the way the auditor decides he wants them. At best, the administrator must, before he acts, negotiate with the General Accounting Office, must submit to its interpretation of law—although it is the duty of the Attorney General to interpret the law—and then perform his task in the manner determined by the General Accounting Office. This

[13] 27 Comp. Gen. 432 (1948).
[14] 36 Comp. Gen. 302 (1956).
[15] 21 Comp. Gen. 1132 (1942).
[16] 10 Comp. Gen. 160 (1930).
[17] 14 Comp. Gen. 78 (1934).
[18] 14 Comp. Gen. 312 (1934).
[19] 24 Comp. Gen. 723 (1945).
[20] 31 Comp. Gen. 510 (1952).

puts a premium on negotiation with that office, is productive of endless delay, and makes the account a maker of policy."[21]

The Task Force Report on the Federal Supply System states:

"On the wall of the office of every responsible supply official, particularly contracting and certifying officers, is figuratively a photograph of the Comptroller General, with a scowl on his countenance. Is all matters involving the expenditure of public funds, the Comptroller General has arrogated unto himself the ultimate authority for determining the legality of administrative actions or procedures. Where a particular field is well covered by statutory direction, he assumes the function of interpreting the often conflicting laws; where statutory direction is vague or lacking, he considers it his duty to repair the omission."[22]

The Task Force approved and adopted portions of the Report of President's Committee on Administrative Management, January 1937, among which was:

"Rulings by an independent auditing officer in the realm of executive action and methods, even when they seem wise and salutary, have a profoundly harmful effect. They dissipate executive responsibility and precipitate executive uncertainty. . . . It has become increasingly difficult, and at times simply impossible for the Government to manage its business with dispatch, with efficiency, and with economic sagacity."[23]

These are harsh words. The evidence upon which those conclusions of fact are based is not detailed in the reports. And the Commission itself recommended no sweeping revision of the Comptroller's functions or authority. In fact, Congress now having in front of it the conclusions and reports of the Commission, presumably having given them due reflection and having taken no action, may be argued to be quite satisfied with the current division of authority between the Comptroller General and the executive agencies. In view of all this, it appears worthwhile to take a look in some depth at one of the concepts urged upon the executive departments by the Comptroller General. The proposition that "personal services may not be obtained upon a contractual basis but are required to be performed by regular employees who are responsible to the Government and subject to its supervision"[24] is well adapted to that end. While at one time it was thought to be a rule of law, it is now stated to be a rule of policy, and of policy established by the accounting officers of

[21] Budget and Accounting, a report to the Congress by the Commission on Organization of the Executive Branch of the Government, February 1949, p. 55.

[22] Task Force Report on the Federal Supply System [Appendix B]. Prepared for the Commission on Organization of the Executive Branch of the Government, January 1949, p. 6.

[23] *Id.*, p. 7.

[24] 33 Comp. Gen. 170 (1953).

the Government.[25] No examination of one of the accounting concepts of the Comptroller General will, of course, be dispositive of whether the authority exercised by him is wisely vested, has or has not been an impediment of significance in Government procurement, or has been so burdensome as to prevent the full accomplishment of his auditing functions. It may, however, reveal one of the reasons why Government procurement is sometimes uncertain.

II. PERSONAL SERVICES AND THE LAW

A. *Introduction*

In the orderly exposition of an orderly subject, this would be the place to set down in some detail the substantive content of the matter, or rule, under discussion. The rule that personal services for the Government must be performed only by Government employees is not difficult to enunciate. The rub comes in finding out what it means. What are personal services? Are personal services always personal, or are they by some sort of alchemy nonpersonal when they are unobjectionable? What is wrong with personal services being performed by independent contractors anyway? What is the evil intended to be cured by the rule? Is the law, or the rule, or the policy sufficiently precise so that procurement officers in the executive branch can determine without reference in every case to the Comptroller General what are personal services, and thereby avoid the impact of the prohibition? Are there exceptions to the rule? If so, what are they?

The answers to these questions are of more than fleeting interest to operating officials. For instance, the Securities and Exchange Commission was once directed by statute to make a report to Congress before a certain date. Its chairman stated to the Comptroller General that the only way the task could be done in time was to contract with a private firm to punch, sort, and tabulate cards containing certain information extracted from questionnaires sent out by the Commission. He further urged that the equipment and personnel of his agency were inadequate to the task, and that to rent equipment and to hire and train personnel would create an undue hardship in view of the temporary nature of the project. The proposed contract was disapproved.[26] In another case the Army was forbidden to contract with a

[25] *Ibid.*
[26] 15 Comp. Gen. 951 (1936).

private firm for the processing of shipping orders and purchase requisitions at the Engineer Supply Control Office in St. Louis, when that office was caught between a rigid personnel ceiling and a greatly increased workload brought on by the Korean War. This in spite of the fact that Congress had been advised that such temporary increases in workload would be contracted out.[27] Other examples, while perhaps of not as great importance, must produce a disproportionate share of executive headaches, to say nothing of irritated citizens. A $39.00 voucher for the preparation of a report by an ex-employee of the Government was paid only after extended correspondence.[28] And a $6.00 bill to a local employment agency was apparently never paid because the Navy Department had not first determined whether the United States Employment Service could have supplied the employees required.[29]

It is not at all clear that dispositive answers to the questions asked, and others, are discoverable. Anyhow, the place to begin seems to be with the law.

B. *Statutory Recognition*

There is no legal prohibition against the procurement by contract of personal services. On the contrary, Congress very early recognized that such procurement was necessary. Section 10, act of 2 March 1861 (12 Stat. 220), from which section 3709, Revised Statutes, was derived, provides:

> "That all purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same."

There was, of course, contention as to what were these personal services which had been excepted from the necessity of advertising. The largest bone seems to have been whether such personal services could be performed by anyone else but the contractor in person.[30] None of this detracts from the proposition that Congress recognized that the Government would have need for personal services, that they might be contracted for, and that such contracts were exempt from the requirement for advertising. The act is in itself, of course, not authority to con-

[27] 32 Comp. Gen. 427 (1953).
[28] 31 Comp. Gen. 510 (1952).
[29] 1 Comp. Gen. 409 (1922).
[30] 15 Op. Atty. Gen. 538 (1876); 15 Op. Atty. Gen. 235 (1877); 6 Comp. Dec. 314 (1899). The dispute continues. 30 Comp. Gen. 490 (1951).

tract. But it can hardly be said that the exception in the act is applicable only to the contract entered into by Government employees. If it does not relate solely to civil servants, then it must envision the performance under certain circumstances of personal services by independent contractors.

Section 3709, Revised Statutes, was amended by section 9(a), Administrative Expenses Act of 1946 (60 Stat. 809; 41 U.S.C. 5), to read in pertinent part:

> "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except . . . (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis."

H. R. 6533, Seventy-ninth Congress, was the bill which became the act of 2 August 1946, *supra*. H. R. 4586, Seventy-ninth Congress, on which action was not taken, but which was the forerunner of H. R. 6533, read somewhat differently:

> "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies and services for the Government may be made or entered into only after advertising a sufficient time previously for proposals except . . . (4) when the services are to be performed by the contractor in person under Government supervision, and paid for on a time basis."

H. R. 4586, Seventy-ninth Congress, was prepared by the Bureau of the Budget in cooperation with all the other interested Government departments.[31] Mr. Lawton, Administrative Assistant, Bureau of the Budget, advised the House Committee on Expenditures in the Executive Department that section 9 of the bill "clarifies the fact that this provision does not apply to contracts for personal services of an individual under Government supervision. Otherwise, it is simply a restatement of existing law."[32] The Senate Report on H. R. 6533 explained the amendment of H. R. 4586, "In this subsection (4) the committee revised the language slightly to insure that personal services of a technical or professional nature would not have to be advertised for."[33] The bill, in so far as it related to Government purchases, was "designed to be perfecting only."[34] It is also clear that the

---

[31] Hearing before the House Committee on Expenditures in the Executive Department on H. R. 4586, 79th Cong., 2d Sess. at 1, 4 (1946).
[32] *Id.*, p. 28.
[33] S. Rep. No. 1636, 79th Cong., 2d Sess. 7 (1946).
[34] H. R. Rep. No. 2186, 79th Cong., 2d Sess. 1 (1946).

Comptroller General participated in the development of the statute.[35]

Section 3709, Revised Statutes, does not apply to the Departments of the Army, Navy, Air Force, the Coast Guard, or the National Advisory Committee for Aeronautics (10 U.S.C. 2314). But Chapter 137, title 10, United States Code, does, and section 2304(a) provides:

> "Purchases of and contracts for property or services covered by this chapter shall be made after formal advertising. However, the head of an agency may negotiate such a purchase or contract, if . . . (4) the purchase or contract is for personal or professional services . . ."

This provision stems from section 2(c)(4), Armed Services Procurement Act of 1947 (41 U.S.C. 151(c)(4), 1952 ed.); repealed by section 53, act of 10 August 56 (70A Stat. 641). The codification made only editorial changes in section 2(c)(4). The Senate Report accompanying the bill which became the Armed Services Procurement Act stated of section 2(c)(4):

> "This provision is an adaptation of the exception from advertising heretofore provided by Revised Statute 3709 . . . with respect to contracts for services which are required to be performed by the contractor in person and which are (a) of a technical and professional nature or (b) under Government supervision and paid for on a time basis."[36]

Thus Congress beginning in 1861, and most recently in 1956, has repeatedly recognized the need for the performance of personal services for the Government by persons not engaged pursuant to the civil service and classification laws, and indeed has placed the contracts for such services in a preferred category.

C. *Administrative Expenses Act of 1946*

If we could stop here and go on to a consideration of what in fact are personal services, our route and destination would be a good deal more certain. However, in 1946, there was enacted a statute dealing with experts and consultants. Section 15, Administrative Expenses Act of 1946 (60 Stat. 810; 5 U.S.C. 55a), provides:

> "The head of any department, when authorized in an appropriation or other Act, may procure the temporary (not in excess of one year) or intermittent services of experts or consultants or organizations thereof, including stenographic reporting services, by contract, and in such cases such service shall be without regard to the civil service and classification

[35] Hearing before the House Committee on Expenditures in the Executive Department on H. R. 4586, 79th Cong., 2d Sess. 28 (1946).

[36] S. Rep. No. 571, 80th Cong., 2d Sess. 6 (1947).

laws (but as to agencies subject to the Classification Act of 1949 at rates not in excess of the per diem equivalent of the highest rate payable under said sections, unless other rates are specifically provided in the appropriation or other law) and, except in the case of stenographic reporting services by organizations, without regard to section 3709, Revised Statutes."

This section was originally section 17, H. R. 4586, Seventy-ninth Congress, as previously discussed, and was prepared by the Bureau of the Budget in cooperation with all the other Government departments.[37] Mr. Lawton, Administrative Assistant, Bureau of the Budget, explained to the House Committee that "It is a codification. The principal purpose, I might add, is to avoid the charge that the appropriations committees have become legislative committees, by enacting into the appropriation act provisions which are in a sense basic law. . . ."[38] He noted that scattered through appropriations bills was authority for the appointment of experts, that "90%" of the persons who would be covered by the bill were paid on a per diem basis, and that the bill simply provides that if there is authority for the hire of such persons in an appropriation act, that act is not subject to a point of order.[39] "That is all it does."[40] It is stated in the Senate Report that "The principal purpose of the bill . . . is the permanent enactment of numerous provisions which, although of a continuing and general character, have been included hitherto in the annual appropriation acts."[41]

D. *Need For 1946 Act*

While it is clear that Congress intended nothing new by the enactment of this statute, the purpose of the provisions appear-

---

[37] Hearing before the House Committee on Expenditures in the Executive Department on H. R. 4586, 79th Cong., 2d Sess. at 1, 3 (1946).

[38] *Id.*, p. 6.

[39] *Id.*, p. 7.

[40] *Ibid.*

[41] S. Rep. No. 1636, 79th Cong., 2d Sess. 1 (1946). For instance, section 9, Military Appropriations Act, 1946 (59 Stat. 405), provides: "Whenever, during the fiscal year ending June 30, 1946, the Secretary of War should deem it to be advantageous to the national defense, and if in his opinion the existing facilities of the War Department are inadequate, he is hereby authorized to employ by contract or otherwise, without reference to section 3709, Revised Statutes, civil service or classification laws, or section 5 of the Act of April 6, 1914 (38 Stat. 335), and at such rates of compensation (not to exceed $25 per day and travel expenses, including actual transportation and per diem in lieu of subsistence while travelling from their homes or places of business to official duty station and return as may be authorized in travel orders or letters of appointment for individuals) as he may determine, the services of architects, engineers, or firms or corporations thereof, and other technical and professional personnel as may be necessary."

ing in annual appropriations acts, the need for which this statute was to obviate, assumes some significance. The section of the appropriations act set out at footnote 41 does several things. It authorizes the Secretary of War to procure the services of architects, engineers, and other technical and professional personnel. This he may do by contract or otherwise. He may do so without advertising and without regard to the civil service and classification laws. And, he may utilize organizations of at least architects and engineers. It seems fairly certain that these provisions were designed to give substantive authority to procure the personal services of highly skilled individuals, and to meet the objections of the Comptroller General. The apparent, if not real need for such substantive authority probably arose out of the Comptroller General's rule that personal services should be performed by Government employees, and not by independent contractors. Whether that rule was then believed to be founded on a statutory prohibition or alone on high Governmental policy is not crucial. As late as 1943, the Comptroller General believed that statutes supported the rule.[42] By 1945, however, he had abandoned the notion that the rule was based on anything else but policy.[43] There is no showing that Congress was apprised of the change of position. Because the Comptroller may refuse to permit payment for personal services already rendered,[44] or may withhold approval of a personal service contract,[45] or may require the earliest practicable termination of such a contract,[46] it makes little difference to the officials of an executive department, who assist and are influential in the drafting of the type of legislation here considered, whether the Comptroller's objections are policy or statutory. The point is that it would be difficult to argue that although there never was a statutory prohibition as such against contracting for personal services, the long history of enabling statutes established such a prohibition. The ready answer to such argument is that if Congress believed such a prohibition existed, it merely made a mistake, and no undue significance can properly be attached thereto. In any event, there

[42] 22 Comp. Gen. 700 (1943).
[43] 24 Comp. Gen. 924 (1945).
[44] 31 Comp. Gen. 510 (1952).
[45] 15 Comp. Gen. 951 (1936).
[46] Ms. Comp. Gen. B–113739, 3 Apr 1953.

was a general rule against contracting for personal services, and it was never entirely clear whether contracts for the services of especially skilled individuals fell within the prohibition of that rule.[47] The need for the temporary services of especially skilled persons is always great in a complex agency; Congress gave special recognition to that need in section 9, Military Appropriations Act, 1946, set out in footnote 41, and others. That recognition, as will be discussed below, may have been in addition to the recognition of the need for the personal services of less highly skilled individuals. Authority to permit contracting with organizations of certain skilled persons without the necessity for advertising was needed and supplied to avoid the Comptroller General's belief that even before its amendment the exception for personal services in section 3709, Revised Statutes, was applicable only to contracts with individuals.[48]

In addition to granting the authority to procure a special kind of personal services, the Military Appropriations Act, 1946, *supra*, provided:

> "For compensation for personal services in the War Department proper, as follows:
>
> "Office of Secretary of War: Secretary of War, Under Secretary of War, Assistant Secretaries of War, and other personal services, $564,000: *provided*, that not to exceed $200,000 of the appropriations contained in this list for military activities shall be available . . . for the temporary employment of persons (at not to exceed $25 per day) or organizations, by contract or otherwise, without regard to section 3709 of the Revised Statutes or the civil service or classification laws: Provided: that no field service appropriation shall be available for personal services in the War Department except as may be express by authorized herein . . . .
>
> "The Secretary of War is authorized to employ such additional personnel at the seat of Government and elsewhere, and to provide out of any appropriations available for the Military Establishment for their salaries . . . and other services as he may deem necessary to carry out the purposes of this Act, but the amount so used for personal services at the seat of government, other than for field service employees, shall

[47] In 26 Comp. Gen 468 (1947), the use of special knowledge was said to be one factor leading to the conclusion that the services involved were nonpersonal. However, in 6 Comp. Gen. 134 (1926), it was said that the services of a particular architect should be obtained in accordance with civil service rules and regulations and at a rate of pay authorized under the personnel classification act.

[48] 6 Comp. Gen. 430 (1926); 30 Comp. Gen. 490 (1951).

not exceed one-third of 1 per centum of the total amount of cash appropriated for the Army."[49]

It is apparent that the drafters of this section of the statute were concerned with two problems. First, the rule enunciated by the Comptroller General against personal services. And, second, section 4, act of 5 August 1882 (22 Stat. 255), which provides:

> "That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year, and no civil officer . . . or other employee shall hereafter be employed at the seat of government in any executive department . . . or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation."

The evil which this statute was designed to cure "consisted in the appointment of clerks and the employment of labor by officers in the Executive Departments, bureaus, and offices at the seat of the Government in excess of those appropriated for, in order to make places for favored persons, and the payment of their salaries or wages either from contingent or other appropriations."[50]

After the enactment of section 15, Administrative Expenses Act of 1946, *supra*, the language in at least military appropriations acts took on new color. Section 7, Military Appropriations Act, 1948 (61 Stat. 570), authorized the use of section 15. But

[49] Statutory language treating with personal services varies. For instance in the National War Agencies Appropriation Act, 1946 (59 Stat. 473), the office of Alien Property Custodian was enjoined not to spend more than $70,000 "for the temporary employment of persons or organizations by contract or otherwise for special services without regard to the civil service and classification laws," (59 Stat. 474). The Office of Economic Stabilization was authorized salaries and expenses for "temporary employment (not to exceed $6,360) of persons and organizations by contract or otherwise, without regard to civil service and classification laws" (59 Stat. 475), the Office of Scientific Research and Development was authorized salaries and expenses for "the employment by contract or otherwise, without regard to civil-service or classification laws at not to exceed $25 per day for individuals, of engineers, scientists, civilian analysts, technicians, or other necessary professional personnel or firms, corporations, or other organizations thereof" (59 Stat. 473), and the Office of War Information was limited to a certain sum "for the temporary employment in the United States of persons by contract or otherwise without regard to the civil service and classification laws" (59 Stat. 477).

[50] 6 Comp. Dec. 314 (1899).

with respect to personal services of the garden variety the language was:

> "The Secretary of War is authorized to employ such additional personnel at the seat of government and elsewhere, and to provide out of any appropriations available for the Military Establishment for their salaries . . . and other services, and supplies as he may deem necessary to carry out the purposes of this Act, but the amount so used for personal services at the seat of government, other than for field services employees and employees of other agencies paid from funds transferred thereto from appropriations contained in this Act, shall not exceed . . . ."[51]

There is no reference to "organizations," or to "contract or otherwise," or to section 3709, Revised Statutes. By 1948 even the authority to employ additional personnel "elsewhere" had disappeared.[52] The change is susceptible of at least two explanations. The first is that it was realized that substantive authority to procure personal services by contract or otherwise away from the seat of Government had never been necessary in the first place. Thus the Comptroller General announced in 1945 that the rule was founded on his policy alone.[53] The second possible explanation is that it was felt that section 15, Administrative Expenses Act of 1946, *supra*, was the only authority which could be utilized to procure personal services, whether they were the services of "experts and consultants" or of less highly skilled individuals. This latter view finds some support in the assumption of identity between the phrases "expert or consultant" and "personal and professional."[54] For a time the Comptroller General apparently felt that all personal services must be procured either pursuant to section 15 or to the civil service and classification laws. His office excepted to the payment of vouchers for "caretaking services (including supply, administration, property accounting records, organizational maintenance, and security of Organized Reserve Corps equipment)" on the basis that "Payment for services as provided in contracts is not authorized as they do not fall within the exceptions for employment of personal

---

[51] Military Appropriations Act, 1948 (61 Stat. 569).

[52] The Military Functions Appropriation Act, 1949 (62 Stat. 666), provides only that "The Secretary of the Army is authorized to employ additional personnel at the seat of government and to provide out of any appropriations available for the Department of the Army for their salaries, but the amount so used for personal services at the seat of government, other than for field service employees . . . shall not exceed . . . ."

[53] 24 Comp. Gen. 924 (1945).

[54] In Mallow, *Experts and Consultants in Government*, 14 Federal Bar Journal 357 (1954), it is noted that "Various departments have issued regulations concerning the subject of expert or consultant services, or, as they are otherwise known, personal and professional services."

services as contained in General Provisions, Military Appropriations Act of 1948 or Public Law 600, 79th Congress."[55] There is indication that the Army adhered to the same view. In a 1951 opinion of The Judge Advocate General, it was stated, "Except as authorized by 5 U.S.C. 55a, it appears that personal services must be procured pursuant to the Civil Service and Classification laws."[56]

It would not have been unreasonable to conclude that section 15, Administrative Expenses Act of 1946, *supra*, applied only to the services of experts and consultants when those services were characterized as personal. In 1944, the Comptroller General held that an individual engaged to deliver a series of lectures at the School of Military Government, Charlottesville, Virginia, was performing non-personal services and therefore that his compensation was not limited by section 9, Military Appropriations Act of 1944 (57 Stat. 368).[57] This section was essentially similar to section 9, Military Appropriation Act, 1946, set out at footnote 41, and was the type of provision the recurring need for which section 15, Administrative Expenses Act of 1946, *supra*, was to obviate. However, in 27 Comp. Gen. 695 (1948), it was shown that non-personal services of individuals might also be procured under section 15, Administrative Expenses Act of 1946, *supra*. It is interesting that in arriving at this conclusion the opinion relied on two earlier opinions which had held only that the maximum compensation limitation in section 15 was inapplicable to corporations or organizations performing non-personal services.

E. *Comptroller General's Interpretation Of 1946 Act*

However, after all is said and done it really doesn't make much difference whether section 15, Administrative Expenses Act of 1946, *supra*, was designed to cope in part with the rule against contracting for personal services. In 36 Comp. Gen. 338 (1956), the Comptroller General stated:

> "This statute [section 15, Administrative Expenses Act of 1946, supra] constitutes the basic general authority to procure by contract, without advertising the services of individuals and organizations of experts and consultants. Its operative effect, by its terms, is contingent upon the passage of an appropriation or other act granting specific authority to the head of the particular department or agency concerned. The utilization of the authority so granted is intended for and, of course, is limited

[55] Ms. Comp. Gen. B–72157, 28 June 1949.
[56] JAGT 1951/5499, 14 Sep 1951.
[57] 24 Comp. Gen. 414 (1944).

to the furtherance of authorized agency functions. Furthermore, where the services required would ordinarily fall within the scope of work generally performed by officers and employees of the agency or of other Government agencies, the determination to invoke such contracting authority should be based upon cogent considerations of the necessity, efficiency, and economy of the contract procurement, cf. 26 comp. Gen. 188; *id.* 442; 31 *id.* 372; 33 *id.* 143; and *id.* 170. See also House Report No. 2894, 84th Congress, Employment and Utilization of Experts and Consultants."

26 Comp. Gen. 188 (1946) and 26 Comp. Gen. 442 (1946) opine that the maximum compensation limitations set out in section 15, Administrative Expenses Act of 1946, *supra*, do not apply to firms and corporations performing non-personal services.[58] 33 Comp. Gen. 170 (1953) and 31 Comp. Gen. 372 (1952) do not relate to any specific statutory authority for procuring the services of experts and consultants, but do deal with "the general rule established by the decisions of the accounting officers . . . that purely personal services may not be obtained on a contractual basis but are required to be performed by regular employees who are responsible to the Government and subject to its supervision." The question in 33 Comp. Gen. 143 (1953) is whether the Commissioner, Federal Housing Administration, may procure personal services by contract and if so whether the services there considered fall within the advertising exception in Revised Statutes 3709. The House report referred to represents the interim findings of the Legislative and Reorganization Subcommittee of the House Government Operations Committee in its inquiry into the employment and utilization of experts and consultants in carrying on the business of the Government. The report noted the tendency among Government leaders to call in outside businessmen, industrialists, scientists, and experts from all fields of endeavor to consult and advise, emphasized that such experts were a valued source of knowledge and experience which the Government could not prudently ignore, but cautioned that there might be a dangerous tendency to over-emphasize the value and effectiveness of private business ideas and methods in Government and that conflict of interest is always an inherent danger in utilizing private businessmen as experts and consultants in Government.[59] The report states that "Agencies subject to the classification Act and the civil service rules may not procure personal services by means other than through prescribed

[58] It is not clear whether an organization of experts and consultants which performed personal services would be subject to that limitation.

[59] H. R. Rep. No. 2894, 84th Cong., 2d Sess. 3 (1956).

competitive processes unless they are authorized to do so by statute or by civil service regulations."[60] In context it would seem that this statement of general principle was intended to refer to all personal services and not only to those performed by experts and consultants procured pursuant to section 15, Administrative Expenses Act of 1946, *supra*, or one of its counterparts.[61] If that is the intent of the statement, it is probably inaccurate. It is clear that even the Comptroller General would not agree. In 22 Comp. Gen. 700 (1943), he concurred in the statement that "The classification Act and Rules and Regulations promulgated by the Civil Service Commission pursuant thereto, contemplate that in the *appointment* of personnel the Federal Agencies affected thereby shall conform to the prescribed Rules and Regulations, but there is no prohibition contained in the Classification Act against contracting for personal services." This statement referred to The Classification Act of 1923 (42 Stat. 1488; 5 U.S.C. 661 et seq. 1946 ed.), which was repealed by section 1202, act of 28 October 1949 (63 Stat. 972). There is, however, similarly no prohibition in the Classification Act of 1949 (63 Stat. 954), as amended (5 U.S.C. 1071 et seq.). And, perhaps more important, section 202 of that act exempts from its provisions not only "experts and consultants, when employed temporarily or intermittently in accordance with" section 15, Administrative Expenses Act of 1946, *supra*, but also "persons employed on a fee, contract, or piece work basis." There is a curiosity in the legis-

[60] *Id.*, at 10.

[61] Authority for the procurement of the services of individuals other than that contained in section 15, Administrative Expenses Act of 1946, *supra*, is scattered through the statutes. The following are examples: Farmer's Home Corporation, section 41, act of 22 July 1937 (50 Stat. 528), as amended (7 U.S.C. 1015); Commodity Credit Corporation, section 10, act of 29 June 1948 (62 Stat. 1073), as amended (15 U.S.C. 714h); Federal Civil Defense Administration, section 401, act of 12 January 1951 (64 Stat. 1254; 50 U.S.C. App. 2253b); Chairman, National Security Resources Board, Director of Central Intelligence, Executive Secretary, National Security Council, section 303, act of 26 July 1947 (61 Stat. 507), as amended (50 U.S.C. 405); special appointment authority in connection with Bonneville Dam, section 10, act of 20 August 1937 (50 Stat. 736), as amended (16 U.S.C. 832i); Rural Rehabilitation Trusts, section 4, act of 3 May 1950 (64 Stat. 100; 40 U.S.C. 442); National Science Foundation, section 14, act of 10 May 1950 (64 Stat. 154; 42 U.S.C. 1873a); section 801(5), United States Information and Educational Exchange Act of 1948 (62 Stat. 11; 22 U.S.C. 1471); section 14(b), District of Columbia Redevelopment Act of 1945 (60 Stat. 799); Department of Medicine, Veterans Administration, section 14, act of 3 January 1946 (59 Stat. 679); Veterans Administration (undifferentiated personal services), section 1500, Serviceman's Readjustment Act of 1944 (58 Stat. 300); Rubber Producing Facilities Disposal Commission, section 6(a), act of 7 August 1953 (67 Stat. 409).

lative history of the last phrase. The House Report states that it "exempts employments made on a fee, contract, or piece-work basis when authorized by other law."[62] The Senate Report on the Senate bill which in this respect was identical to the House bill repeats the House explanation.[63] Why those reports included the phrase "when authorized by other law" is not clear. The act as approved, H. R. 5931, Eighty-first Congress, which was eventually adopted, S. 1762, Eighty-first Congress, which was introduced at the request of the administration, S. 2379, same Congress, which served the same purpose as the administration bill, and the predecessor bill, H. R. 4169, Eightieth Congress, all exempted "persons employed on a fee, contract, or piece work basis." None of them either expressly or by implication, necessary or otherwise, limited that exemption in any way. It may be that there was some confusion in the drafting of the reports between the exemption for persons employed on a fee, contract, or piece work basis, and the exemption for experts and consultants which is indeed so limited. In any event, it would not seem likely in view of the plain words of the statute and the clear distinction in treatment between experts and consultants on the one hand and persons employed on a fee, contract, or piece work basis on the other that the restriction "when authorized by other law" would be read into the statute. The Comptroller General has not done so, but has adhered to his 1945 position that the rule against contracting for personal services is one of policy alone.

It follows that the Comptroller General regards section 15, Administrative Expenses Act of 1946, *supra*, as providing an exemption only from the civil service and classification acts, and does not provide an exemption from the rule against contracting for personal services. This seems to be his position even though that statute expressly authorizes the procurement by contract of the services of experts, consultants, and organizations thereof. It is his position even though there is evidence that at least one significant reason for the enactment of the provisions the need for which section 15 was to obviate was relief from that rule. It likewise appears immaterial that the Comptroller General has announced that a statute authorizing the expenditure of funds "for employing persons or organizations, by contract or other-

[62] H. R. Rep. No. 1264, 81st Cong., 1st Sess. 7 (1949). This report accompanied H. R. 5931, 81st Congress, which was eventually adopted.

[63] S. Rep. No. 847, 81st Cong., 1st Sess. 33 (1949). This report accompanied S. 2379, 81st Congress.

wise, for special accounting, actuarial, statistical, and reporting, engineering, and organizational services determined necessary . . . without regard to section 3709 of the Revised Statutes . . . , and the provisions of other laws applicable to the employment and compensation of officers and employees of the United States . . . ," authorized an exception to the "general rule . . . that purely personal services may not be engaged by the Government on a non-personal contract basis but are required to be performed by Federal personnel under Government supervision."[64] As a matter of fact, the Comptroller General's belief that section 15, Administrative Expenses Act of 1946, *supra*, had nothing at all to do with the rule against contracting for personal services was enunciated quite early in the game. In 27 Comp. Gen. 503 (1948), it was stated, "However, there is nothing in the terms of said law or its legislative history which may be construed as nullifying the force and effect of the cited rule against the procurement of personal services by contract, and it is believed that the general provisions of said section 15 have a broad field of reasonable operation aside from the restrictions of the cited rule." The argument that the statute is inapplicable to the rule against contracting for personal services because it has wide application beyond that rule is unconvincing. It is not inherently improbable that Congress wanted to do two things at once, i.e., exempt from the classification act and avoid the rule. The very presence in section 15 of the words "by contract" and "organizations," are persuasive that the rule against contracting for personal services was contemplated. It is submitted that the Comptroller General's view of section 15 reads those words out of the statute. At the least it now seems unwise to have dropped from the annual appropriations acts those provisions specifically authorizing the procurement of personal services by contract or otherwise as deemed necessary by the Secretary, since similar provisions in the past have been persuasive, albeit not controlling, to the Comptroller General.[65]

F. *Underwood v. United States*

In support of the rule that personal services must be performed by Government employees, the Comptroller General has some-

[64] 17 Comp. Gen. 300 (1937). Accord: 33 Comp. Gen. 143 (1953).

[65] 33 Comp. Gen. 143 (1953). But see 15 Comp. Gen. 951 (1936), where an advisory metallurgist could not be engaged under contract pursuant to a statute authorizing appropriations "for other personal services, including employment of experts when necessary."

times relied on case and statute law. In 1926, there was called to the attention of the Comptroller General a contract between a certain metallurgist and a Navy purchasing officer calling for necessary advisory services. It was stated "In addition to the objections raised in my letter . . . the contracting with an individual or firm to perform a duty or exercise an authority imposed or conferred by law upon a Government department or establishment is not authorized. See in this connection *Underwood* v. *United States*," 62 Ct. Cl. 378 (1926).[66] The Court of Claims case concerned a claim on an implied contract for commission on the sale of vessels by the United States Shipping Board. The Court denied the claim. The syllabus in the report of the case rests exclusively on the proposition that the board "was not authorized to pay commissions to brokers, nor did it have power to delegate its authority to sell or dispose of said vessels." The Court, however, relied on many grounds. It noted that in fact the sale had not been consummated, that the claimant had no dealings with the board, and concluded its opinion with these words, "From the evidence it appears that the United States Shipping Board had power and authority to sell the vessels in question; that the board never delegated that power or authority to anyone else; that no employee of the board had any authority to commit the United States to the payment of a commission for bringing about the sale of any of these vessels; that the plaintiff represented the purchaser rather than the Shipping Board, and that he had no contract express or implied with any person or agency who was authorized to commit the Government to the payment of a commission for the sale of these vessels." Enough has been quoted to indicate quite clearly that the proposition in the syllabus is *obiter dictum*, and hardly sufficiently firm to found high Government policy. Nevertheless the breadth of the rule announced in 6 Comp. Gen. 51 (1926) would have prevented the procurement of any assistance from outside the Government in the accomplishment of a mission assigned a Government agency by statute. Two years later the Comptroller General found in a statute reading "In disposal of . . . property, the Secretary of War shall cause the property to be appraised . . . by an appraiser . . . to be chosen by him," no Congressional intention to limit the Secretary's choice to employees of the War Department or other departments.[67] In 1935, however, it was thought that statutory authority to make such investigations as it determines necessary prevented a Gov-

[66] 6 Comp. Gen. 51 (1926).
[67] 7 Comp. Gen. 531 (1928).

ernment agency from procuring the services of a state engineer to make an investigation.[68] In 1941, the rule was modified in an opinion to the Attorney General, who was advised that because the statutes involved neither expressly nor by necessary implication provided that the work had to be done only by the Department of Justice the Comptroller General would not object to the payment for punching into alien registration cards certain data previously collected.[69] This proposition of law was probably always so, and may mark a return to the situation prevailing prior to 6 Comp. Gen. 51, *supra.*

G. *Section 169, Revised Statutes*

In 22 Comp. Gen. 700 (1943), the objection to contracting with a firm or third party for personal services was said to be based upon the fact that such contracts delegate to the contractor the right to select persons to render services for the Government which would be in contravention of section 169, Revised Statutes (5 U.S.C. 43), which requires that all appointment of officers and employees be made by the head of the department or agency, or with respect to field services, by a subordinate officer to whom that duty has been delegated. Actually, the statement of the proposition contains its own denunciation. As early as 1920 it was clear that the statute dealt with the "appointment" of officers and employees (Burnap v. United States, 252 U.S. 512 (1920)). In the very opinion which announced the applicability of section 169, Revised Statutes, *supra,* the Comptroller General agreed that the classification act and the regulations issued pursuant thereto were inapplicable because they dealt only with the appointment of personnel. The argument is equally applicable to section 169, and that statute has apparently been abandoned as a buttress to the rule against contracting for personal services.

H. *Conclusion*

It thus seems clear that the rule in its breadth as enunciated by the Comptroller General finds little support in the law. Congress has been for a long time concerned about the number of employees on the Federal payroll and with devices adopted by executive agencies to avoid hire limitations imposed by Congress. Section 4, act of 5 August 1882, *supra,* prohibiting the employment at the seat of Government in excess of the number appropriated for is in point. More recently the legislative history of section 15, Ad-

[68] 14 Comp. Gen. 681 (1935).
[69] 21 Comp. Gen. 400 (1941).

ministrative Expenses Act of 1946, *supra*, shows the problem there considered centered about per diem employees.[70] The same is true of House Report No. 2894, Eighty-fourth Congress, Second Session, 1946, entitled "Employment and Utilization of Experts and Consultants." The point is, however, that Congress has stated who shall be employed pursuant to the Classification Act of 1949, *supra*, and who shall be employed under section 15, Administrative Expenses Act of 1946. And Congress has excluded from the Classification Act persons employed on a fee, contract, or piece work basis, and has enacted a further exception to that act for experts and consultants. If the Comptroller General's opinion that section 15, Administrative Expenses Act of 1946, *supra*, had nothing whatever to do with his rule prohibiting contracting for personal services be true, then that act provided only an additional exception to the classification act. It may indeed be suggested that the Comptroller General's rule is violative of Congressional policy. Congress has stated that persons hired on a "fee, contract or piece work basis" shall not be employed under the Classification Act of 1949, *supra*.[71] When the Comptroller General characterizes as "purely personal" the services performed by any individual or organization, he in effect requires those services to be performed by individuals hired pursuant to the classification act. The executive agency which needs the services has already determined that it is in the best interests of the Government, i.e., less expensive, to procure the services on a "fee, contract or piece work" basis. When the Comptroller General characterizes those services as "purely personal," the executive agency must either (a) go without the services which certainly was not contemplated by Congress, or (b) procure the services under the classification act even though it is paid for on a fee, contract or piece work basis which is really no alternative at all because it cannot be done, or (c) have previously hired Government employees perform the services which in the context of the problem is more expensive or for other reasons not in the best interest of the Government, or (d) hire more Government employees which suffers the same disabilities as alternative (c), and which may be

---

[70] Mr. Lawton, explaining the bill, stated, "They are per diem, or persons paid at the salary rate which is in excess of the civil service rate. They may be hired for a month at a given salary. Generally, I would say that better than 90 percent of them would be persons paid on a per diem rate of pay. The War Department for example, had authority to hire people at $50 a day." Hearings before the House Committee on Expenditures in the Executive Department on H. R. 4586, 79th Cong., 2d Sess., p. 7 (1946).

[71] Section 202, Classification Act of 1949 (63 Stat. 954; 5 U.S.C. 1082(29)).

labeled as a legal but nonetheless unwise and improper evasion of the classification act which in effect informs executive officers that if it is best to procure on a fee, contract or piece work basis then it should not be done pursuant to that act.

It may be asked why, if there be no Congressional policy or law in accord with the Comptroller General's rule, has Congress felt called upon to enact authority to procure personal services. The ready answer appears to be that the Comptroller General spent twenty-five years convincing the executive agencies, and indirectly Congress, that there was something unlawful about contracting for personal services; only in the last 12 years has he agreed that the rule is based on policy alone. During the period 1920 to 1945, the executive agencies whether they agreed or not had no alternative but to seek Congresional authorization. After 1945, the executive agencies needed whatever help might be found in Congressional authorization.[72] Such authorization never was a clear escape from the rule. In view of what has happened to section 15, Administrative Expenses Act of 1946, *supra*, it may be that the Comptroller General will one day conclude that all acts authorizing the procurement of personal services by contract or otherwise are merely exceptions to the classification act, and have nothing to do with his policy. Such conclusion seems inevitable at least with respect to those statutes which, like section 15, Administrative Expenses Act of 1946, *supra*, do not use the word "personal" as a modifier of "services."[73] The phrase "personal" services has for so many years been so closely associated with the Comptroller's policy rule, however, that it might be awkward to suggest that a statute expressly authorizing such services had nothing whatever to do with that rule. The paradox is, though, that it is difficult to legislate around a policy, particularly when it is not entirely clear what the policy is. It is not unthinkable that even a statute authorizing the expenditure of appropriations for "personal services, including personal services without regard to limi-

---

[72] Section 10a, Central Intelligence Act of 1949 (63 Stat. 212; 50 U.S.C. 403) which authorized expenditures for personal services was said to be necessary "in view of the requirements of existing law or Comptroller General's decisions, which specify that such expenditures are not permissible unless authorized by law." S. Rep. No. 106, 81st Cong., 1st Sess. 5 (1949). H. R. Rep. No. 160, same Congress, is identical in this respect.

[73] E. g., section 14, act of 22 July 1937 (50 Stat. 528), as amended (7 U.S.C. 1015); section 10, act of 29 June 1948 (62 Stat. 1073), as amended (15 U.S.C. 714h); section 401, act of 12 January 1951 (64 Stat. 1254; 50 U.S.C. App. 2253h).

tations on types of persons to be employed,"[74] might be held by the Comptroller General to constitute merely an additional exception to the classification act. The obvious cross-reference to section 15, Administrative Expenses Act of 1946, *supra*, may lead to the conclusion that all that was intended was that persons other than "experts and consultants" might be engaged, leaving the policy against contracting for personal services unimpaired. In so far as it is practicable at all to overcome the Comptroller General's policy by statute, it would appear as a minimum that the statute authorize the procurement of personal services "by contract or otherwise."

III. THE RULE

A. *Statutory Definition*

As was previously noted, the consequences of entering into a contract denominated by the Comptroller General as a personal services contract may, to say the least, be disruptive of orderly procurement procedures. Payments under the contract may be excepted to, it may be required that the contract be promptly cancelled, or that at the expiration of the contract no similar contract be entered into. Thus it is imperative that procurement officials in the executive agencies be able to recognize a personal services contract. It is the purpose of this chapter to propound, if possible, a definition of a personal service contract of sufficient utility to be used as a standard.

The statutes afford little help. Section 10, act of 2 March 1861 (12 Stat. 200) from which section 3709, Revised Statutes, *supra*, was derived excepted from the requirement of advertising purchases and contracts "for personal services." This wording was changed by section 9(a), Administrative Expenses Act of 1946, *supra*, to except purchases and contracts "when the services are required to be performed by the contractor in person and are (a) of a technical and professional nature or (b) under Government supervision and paid for on a time basis." No change in previous law was contemplated.[75] It would not have been difficult to view the 1946 amendment as a Congressional determination of the meaning of "personal services," applicable equally to the exception from advertising and to the rule against contracting for personal services, particularly since until shortly before that time

[74] Section 10a, Central Intelligence Agency Act of 1949 (63 Stat. 212; 50 U.S.C. 403j).

[75] Hearings before the House Committee on Expenditures in the Executive Department, on H. R. 4586, 79th Cong., 2d Sess. at 28 (1946).

the rule was believed to be founded on law. This, however, was not done. While it is clear that only contracts with individuals are excepted from the advertising requirement,[76] a contract with a firm, corporation, or organization may offend the Comptroller General's policy.[77] Title 10, United States Code, section 2304(4), and section 302(c)(4), Federal Property and Administrative Services Act of 1943 (63 Stat. 337; 41 U.S.C. 252(c)(4)), exempt from the requirement for advertising purchases and contracts "for personal or professional services." Apparently, relying on an assumed identity of the word "personal" (10 U.S.C. 2304(4)) and the word "individual" in section 3709, Revised Statutes, *supra,* and on the use of the disjunctive "or" in "personal or professional services" contrasting with the conjunctive "and" in section 3709, Revised Statutes, *supra,* the Armed Services have concluded that professional services performed by a firm need not be advertised for.[78] There is nothing in the legislative history of section 2(c)(4), Armed Services Procurement Act of 1947, *supra,* which would suggest that Congress intended any substantive change in the law by the use of the word "or." In view of Congress's historical preference for advertised procurement, the Armed Services reasoning would appear to be strained. However, the Comptroller General has not objected. In any event the bald use of the word "personal" in those statutes gives no additional suggestion as to its meaning other than that found in the proposition that no change from section 3709, Revised Statutes, was intended.

B. *Master and Servant*

There is some suggestion that the relationship existing between the Government and one performing personal services, as that term is used by the Comptroller General, may be coextensive with that between the common law master and his servant. For instance, in 23 Comp. Gen. 398 (1943) "contract *officers or employees*" are distinguished from "contractors employed on other than a personal service basis."[79] It has also been held that "where the services to be performed under contract are purely personal in nature, as distinguished from nonpersonal services . . ., it would

[76] 30 Comp. Gen. 490 (1951).

[77] 27 Comp. Gen. 503 (1948).

[78] ASPR 3-204.2 (20 June 1957) provides "if personal services, they are required to be performed by an individual contractor in person (not a firm), or if professional services they may be performed either by an individual contractor in person or a firm or organization." See Navy Contract Law, Bureau of Naval Personnel, NavPers 10841, p. 49 (1949).

[79] Accord 23 Comp. Gen. 425 (1943).

appear that any amount payable on account of the performance of such services is payable as a result of an employer-employee relationship existing between the United States and the person performing the service . . . ."[80] The suggestion gains some color from the fact that many of the factors commonly used in law to determine whether master-servant relationship exists are sometimes persuasive to the Comptroller General on the question of whether a given arrangement is one for personal services. Such common factors are the extent of control exercised over the details of the work,[81] whether the one doing the work is in a distinct occupation,[82] the skill required,[83] who supplies the instrumentalities, tools, and the place of work,[84] the length of time necessary to do the work,[85] the method of payment,[86] whether the work is a part of the regular business of the person paying for the work,[87] and whether the parties believe an employer-employee relationship exists.[88] Nonetheless, the answer to the question of whether an employer-employee relationship exists is not dispositive of the question of whether the arrangement is one for personal services. There are important factors not common to the two concepts. The Comptroller General has occasionally been impressed in concluding whether a contract was objectionable because it was for personal services by cost,[89] whether the contractor had adequate internal supervision,[90] whether Government employees were available to do the work,[91] and whether he believed Congress intended the work to be done by other than Government employees.[92] None of these factors is relevant to a determination of an employer-employee relationship. At least one factor stressed in the Restate-

[80] Ms. Comp. Gen. B–77333, 28 June 1948. Accord 27 Comp. Gen. 695 (1948).

[81] Restatement, Agency, §220(2)(a) (1933); 24 Comp. Gen. 414 (1944); 26 Comp. Gen. 188 (1946); 26 Comp. Gen. 68 (1946).

[82] Restatement, Agency, §220(2)(b) (1933); 6 Comp. Gen. 180 (1926).

[83] Restatement, Agency, §220(2)(d) (1933); 11 Comp. Gen. 99 (1931); 26 Comp. Gen. 468 (1947).

[84] Restatement, Agency, §220(2)(c) (1933); 17 Comp. Gen. 300 (1937); 26 Comp. Gen. 468 (1947).

[85] Restatement, Agency, §220(2)(f) (1933); 6 Comp. Gen. 134 (1926); 26 Comp. Gen. 468 (1947).

[86] Restatement, Agency, §220(2)(g) (1933); 26 Comp. Gen. 442 (1946); 26 Comp. Gen. 468 (1947).

[87] Restatement, Agency, §220(2)(h) (1933); 27 Comp. Gen. 503 (1948).

[88] Restatement, Agency, §220(2)(i) (1933); Ms. Comp. Gen. B–82269, 5 April 1949, only case on point discovered.

[89] 21 Comp. Gen. 388 (1941); Ms. Comp. Gen. B–58059, 13 July 1946.

[90] 26 Comp. Gen. 468 (1947).

[91] *Ibid.*

[92] 21 Comp. Gen. 388 (1941).

ment of the Law of Agency, the custom of the community as to the control ordinarily exercised in a particular occupation,[93] has never been articulated by the Comptroller General. Frequently the so-called common factors have been ignored, sometimes have been treated expressly or by necessary implication as neutral circumstances, and sometimes applied indifferently.[94] It is also probable that the characterization of persons performing personal services as employees was intended by the Comptroller General to be limited to the precise question considered in the opinions announcing the characterization; i.e., whether such a person was included within the provisions of a particular statute,[95] or whether payment for the services of such persons should be made from the regular payroll and subject to income tax deductions.[96] In the absence of a categorical announcement by the Comptroller General that the two concepts are substantially similar, it must be concluded that the question whether the services are personal services is not solved by a determination that the relationship is one of master and servant.[97]

C. *Bona Fide Necessity*

In a thoughtful opinion in which it was admitted that the basis of the rule was not discoverable by an examination of the opinions of the Comptroller General, The Judge Advocate General of the Army nonetheless concluded that the first and most important of certain very broad principles was whether there was a *"bona fide* necessity" for the services.[98] One assumes that the rule of *"bona fide* necessity" means is it necessary that the services be procured in one manner rather than in another. The next question is who makes the determination of necessity. If it is the Comptroller

[93] Restatement, Agency, §220(2) (c) (1933).

[94] Work done on Government installation ignored, Ms. Comp. Gen. B–82269, 5 April 1949; advisory services of law firm were personal services, Ms. Comp. Gen. B–122228, 23 December 1954; temporary character of services ignored, 15 Comp. Gen. 951 (1936); emphasized where one contractor was to furnish office and equipment, ignored where another was not, 28 Comp. Gen. 50 (1948); objection on basis Government would not be able to exercise supervision over workers, 22 Comp. Gen. 700 (1943); where Government supplied all material for janitorial services, and "employees" were told what their duties were, what time to come to work, and when to leave, the services were "nonpersonal" because no "direct" supervision, Ms. Comp. Gen. B–82269, 5 April 1949.

[95] 23 Comp. Gen. 398 (1943); 23 Comp. Gen. 425 (1943).

[96] 27 Comp. Gen. 695 (1948).

[97] The Judge Advocate General has noted that in doubtful cases the relationship created may tip the scales for or against approval of the contract. JAGT 1952/1432, 24 January 1952.

[98] *Ibid.*

General who makes that determination, whether before or after the fact, the principle seems little more than a shorthand expression of all the factors used by that officer in concluding whether to approve an arrangement. The Judge Advocate General's opinion itself notes that those factors go not only to the relationship established between the parties but also to the principle of necessity. The thought may linger that the greater the need the less chance of disapproval. This does not seem to be so. In 15 Comp. Gen. 951 (1936), the Chairman, Securities and Exchange Commission, is reported to have advised the Comptroller General that the one possible method of accomplishing a task set for him by Congress was to contract with a private company to punch, sort, and tabulate a number of electric accounting machine cards. The contract was disapproved. In 32 Comp. Gen. 427 (1953), the Army reported that the imposition of personnel ceilings prevented the hiring at the Engineer Supply Control Office of additional Government employees to handle the increased workload occasioned by the Korean War. The work was termed "essential military operations." The Army noted that the Assistant Secretary of Defense for Manpower and Personnel had testified before a subcommittee of the Senate Committee on Appropriations that "contract services" would be used instead of placing civilian employees on Government payrolls wherever possible. Accordingly, the Army contracted with a private firm for the processing of shipping orders and purchase requisitions. The Comptroller General required that the contract be terminated at the earliest practicable date. The first reason given for this decision was that otherwise the ceiling on the number of graded civilian employees that could be employed in the Department of Defense would be "meaningless." This is, of course, a non sequitur. The Department of Defense ceilings were on "full-time graded civilian employees," including the full time equivalent of part-time employment, consultants, when actually employed persons paid on a contract or per diem basis, and persons employed without pay when reimbursed for expenses.[99] Congress was thus quite explicit and quite detailed in its expression of what the ceiling was to cover. And, contractor employees were not included. It could have as well been held that the Congressional ceiling meant what is said, full time graded civilian employees will not exceed a certain figure, and since contractor employees were not within the Congressional

[99] Section 632, Department of Defense Appropriation Act, 1952 (65 Stat. 450). Section 630, Department of Defense Appropriation Act, 1953 (66 Stat. 536).

definition of full-time graded civilian employees the ceiling is not for application. The underlying rationale seems to be that Congress should have included contractor employees in the ceiling and the Comptroller General was going to supply the omission. The second reason given was that procurement of the services by contract was unauthorized in that it contravened the general rule that purely personal services must be performed by Federal personnel under Government supervision. What the Army was able to do to get the "essential military operations" done is not known. It must be concluded, however, that an administrative determination of pressing necessity, even when communicated to and acquiesced in by an authoritative body of Congress, is of little persuasion to the Comptroller General.

D. *Broad Formulation*

In 26 Comp. Gen. 468 (1946), it was stated "However, in determining whether certain services are personal there are for consideration such factors as the degree of direct Government supervision over the services performed, the furnishing of equipment and supplies to perform the services, the furnishing of office or working space, the use of special knowledge or equipment, the temporary character of services which no Government employee is qualified or available to perform, etc., and whether the fee or the amount of the contract price is based upon the results to be accomplished rather than the time actually worked, and whether the amount paid as compensation covers not only the contractor's time but the use of his facilities, office staff, equipment, etc." Each of these criteria needs individual consideration.

1. Government Supervision—In 1899, the Comptroller of the Treasury defined personal services as "an individual service performed by a single person, or by firms, for the Government, under a contract made with the Government to render for it his or their individual services, of either skilled or unskilled labor under the direction of the Government thereby becoming the servant of the Government in the performance of such labor, ordinarily for a stipulated price."[100] It is readily seen that the one variable in this formula is the degree of supervision exercised by the Government over the worker; the higher the degree of supervision the more likely the service to be personal. This factor is present as often as any in decisions of the Comptroller General. Its formulation varies, however. An interesting case is found in 24 Comp. Gen. 924 (1945). There the question was whether the Navy might

[100] 6 Comp. Dec. 314 (1899).

enter into a contract with a private salvage company for its assistance in raising a sunken ship, and under which the company agreed to detail its salvage master to give technical and professional advice. The Comptroller General stated ". . . [T]his office has authorized the procurement of personal services by contract under circumstances indicating that the need for direct Government supervision is not imperative." At least in this case then the criterion is not the degree of supervision actually exercised by the Government, but rather the degree of supervision which in the opinion of the Comptroller General the Government should exercise. It is also important to note from the quoted clause that the question is not whether the contract is for "personal" or "nonpersonal" services, but whether the Comptroller General approves. In 26 Comp. Gen. 188 (1946) where a firm of public accountants was engaged to audit property disposal transactions with payment to be made on a time basis, the contract was not for personal services because no such supervision as usually prevails in an employer-employee relationship existed. In 26 Comp. Gen. 468 (1947), the fact that there were available private firms with adequate internal supervision was of some persuasion. The Judge Advocate General has formulated the criterion somewhat differently. In JAGT 1954/7313, 20 August 1954, the question was stated to be whether the contractor was subjected to the ordinary supervision normally performed in regular Government supply contracts. In JAGT 1953/4519, 2 June 1953, whether there was a contractual right to exercise supervision was believed important. These formulations, all valid at least in part, are attempts to articulate one thesis which will be valid in all cases. The opinions of the Comptroller General defy such attempts to identify and isolate a common virus. It is difficult to conceive of a service more susceptible of supervision than that performed by a janitor. Yet, a contract for janitorial services to be paid on a time basis where all tools and materials were to be supplied by the Government was approved because the janitors did not work under "direct" supervision and because the parties did not contemplate an employer-employee relationship.[101] The question of supervision was not raised with respect to doctors serving as medical officers at a U.S. Immigration Station who conducted physical and mental examinations of aliens and other doctors inspecting aircraft and quarantine stations.[102] Such services were nonpersonal. Neither was the question treated in considering a contract with a law firm for

[101] Ms. Comp. Gen. B–82269, 5 April 1949.
[102] 28 Comp. Gen. 50 (1948).

legal services in connection with the lending operations of the Small Business Administration. Although the Comptroller General did not object, he stated that the services were "strictly personal."[103] It is clear that frequently a high degree of supervision over contractor employees will predispose the Comptroller General to disapproval, but how much, if any, weight it will bear in any particular case is not subject to precise evaluation.

2. Equipment, Supplies, and Space—Three of the factors listed separately by the Comptroller General are lumped together here because of their equivalence or interrelation. There seems to be no distinction between "the furnishing of equipment and supplies to perform the services," and the "furnishing of office and working space." The rationale is whether the contractor furnishes something of value other than direct labor. Equipment, supplies, office and working space all fall easily into that category and there seems to be no reason to treat them separately or differently. It is also difficult to see why "whether the amount paid as compensation covers not only the contractor's time but the use of his facilities, office staff, equipment, etc.," is a separate category. If indeed the contractor furnishes facilities, staff, equipment, and the "etc." which is probably supplies and space, whether a cost accountant could isolate charges therefor in the contract price would seem immaterial. On the other hand, if such charges were stated separately, this would seem to go only to the point that the contractor did in fact furnish the mentioned items.

Nonpersonal services were quite early defined as those "necessitating the furnishing of both personal services and materials or supplies to complete the work."[104] In 11 Comp. Gen. 99 (1931), the fact that the individual there engaged was required to furnish certain photographs was of some influence in escaping the general rule that a cataloguer performs personal services. It was stated in 22 Comp. Gen. 700 (1943) that "where janitorial services are exclusively personal, that is to say, where the Government agency furnishes all supplies and equipment, leaving nothing but the labor of the individual to be furnished, the matter is one for performance by Government employees, either whole or part time, appointed in accordance with the civil service rules and regulations. . . ." The opinion continued that where it was administratively determined to be advantageous to the Government to have the contractor furnish all the supplies and equipment janitorial

[103] Ms. Comp. Gen. B–122228, 23 December 1954.
[104] 5 Comp. Gen. 231 (1925).

services could be procured on a "nonpersonal service basis." Yet in Ms. Comp. Gen. B–82269, 5 April 1949, janitorial services where all material and supplies were furnished by the Government were approved, the opinion stating "And, while the furnishing of supplies and equipment to the person so engaged, would frequently indicate that such person was an employee, that rule would not necessarily hold good in all cases. An agreement could be made that one party will, by means of supplies and equipment supplied by another, accomplish in his own way and in his own time a specified result and that payment will be made of an agreed amount from the accomplishment of such result." The Comptroller General withdrew his objection to a contract with a law firm when it later appeared that the firm was to furnish its own facilities.[105] A contract with a firm for accounting services was approved on the basis that "it does not appear that such contracts contemplate the mere personal services of an individual or group of individuals but, on the contrary, seek to engage the facilities of the firm as well as the coordinated services of the experts and technicians available to it."[106] No mention of this factor was made in the disapproval of a contract to punch, sort and tabulate electric machine accounting cards, where the contractor's machines and plant were to be used and where it could have been assumed that the contract price included burden not only for those items but for indirect labor and overhead expenses.[107] Nor was it mentioned in an opinion which limited the foregoing one to its facts.[108] In approving a group of contracts for the services of doctors the Comptroller General emphasized that facilities, office space, and equipment was to be furnished when such was the case and ignored the matter when they were not to be furnished.[109]

3. Special Knowledge or Equipment—In considering whether it was necessary to advertise a contract for photolithographic copies of patent drawings, one factor which led the Attorney General in 1876 to conclude that the services were not personal and therefore not exempt from the requirement for advertising was that the process was mechanical and was so characterized by artists.[110] The Comptroller of the Treasury in 1899 said that for

[105] Ms. Comp. Gen. B–122596, 18 February 1955.
[106] 26 Comp. Gen. 188 (1946). See also 24 Comp. Gen. 272 (1944); JAGT 1953/2617, 20 March 1953; JAGT 1954/7028, 11 August 1954; JAGT 1954/1560, 8 February 1954.
[107] 15 Comp. Gen. 951 (1936).
[108] 21 Comp. Gen. 400 (1941).
[109] 28 Comp. Gen. 50 (1948).
[110] 15 Op. Atty. Gen. 538 (1876).

the same purpose it made no difference whether labor was skilled or unskilled.[111] In 1931 the Comptroller General did not object on the basis of his rule against contracting for personal services to a contract with a world authority on ancient beads who was to photograph an art collection. Competition was not required. Apparently the services were personal for purposes of section 3709, Revised Statutes, but not personal for other purposes.[112] This case may lend weight to the argument that whether the services are personal is not the ultimate question; that being only a label attached to a contract when the Comptroller General doubts the wisdom of performance by other than Government employees. In 14 Comp. Gen. 909 (1935), it was stated that the "exception of personal services from the requirements of section 3709, Revised Statutes, is identified and attaches to the individual and means that the personal element predominates," and that therefore the services of particularly qualified architects must be secured by employment or by contract with the individual, not by contract with a third party. Contract should be resorted to only when the highly technical features of the project or other reasons precluded the use of Government employees. However, for purpose of the Comptroller General's policy the services of a law firm were personal, until the Comptroller General became convinced that the facilities of the firm as well as the services of individual attorneys were to be utilized.[113] Where what the author of a brochure was to write was common knowledge among Government employees the contract was objectionable.[114]

Research has disclosed no opinions showing that the specialized nature of the equipment used in performing the services was articulated as a factor bearing on the question whether the services were personal. Frequently executive agencies urge that lack of equipment within the Government makes contracting with a private firm the only practicable way to get the job done. The Comptroller General's response to this plea is varied. In 26 Comp. Gen. 468 (1947), he was impressed by the fact that unless the work were contracted out the Government would have to buy or rent the equipment. Yet, where agency appropriations provide for purchase or rental of equipment it must be so purchased or rented, apparently without regard to comparative economy.[115]

[111] 6 Comp. Dec. 314 (1899).
[112] 11 Comp. Gen. 99 (1931).
[113] Ms. Comp. Gen. B–122228, 23 December 1954; Ms. Comp. Gen. B–122596, 18 February 1955.
[114] 31 Comp. Gen. 510 (1952).
[115] 15 Comp. Gen. 951 (1936).

Probably the factor here considered is a corollary of the one entitled the "temporary" character of services which no Government employee is qualified or available to perform. That is, other things being equal, it might be assumed that the more esoteric the services or specialized the equipment the less likely they are to be available within the Government. The adjective "temporary" would seem to be a part of the same thought; the shorter the duration of the desired services the less practicable it may be to shift Government employees or to otherwise disturb settled Government procedures, or for that matter to hire additional employees.

In 1926 the Bureau of Standards wanted to procure the services of a particular architect. The Comptroller General characterized the proposed agreement as indefinite and was concerned that no date for completion of the services had been stated. Then he advised that if no architect with the desired qualifications was available in the Bureau or in any other Government office the "matter would appear to be one in which such services as may be necessary should be obtained in accordance with civil service rules and regulations and at a rate of compensation authorized under the personnel classification act. . . ."[116] In 6 Comp. Gen. 180 (1926), no distinction was made between Government employees not being qualified and not being available. In either case the services could be contracted out; and, if members of a recognized craft regardless of the degree of skill involved, but there had to be competition.[117] In 13 Comp. Gen. 351 (1934), it was said that the first consideration was whether the services could be performed by Government employees; that resort to outside professional services should be had only when use of Federal employees would be inadequate. A contract for a survey of the internal operations of a Government agency by a private company or individual was unobjectionable even where the work admittedly could be done by Government employees but might be less productive.[118] However, inability to hire Government employees because of personnel ceilings was immaterial in 32 Comp. Gen. 427 (1953). Vouchers for

[116] 6 Comp. Gen. 134 (1926).

[117] That there were no Government employees available did not help a Government stenographer who was engaged at the seat of Government to take a verbatim transcript of an important revenue hearing in contravention of the act of 5 August 1882, *supra*. 5 Comp. Gen. 968 (1926). See also 26 Comp. Dec. 800 (1920), a case dealing with stenographic services, where it was said that the fact that employees provided for the War Department may not have been qualified cannot operate to authorize the use of appropriations other than those expressly provided for personal services.

[118] 33 Comp. Gen. 143 (1953).

janitorial services were not objected to in Ms. Comp. Gen. B–64276, 24 April 1947, although the services were personal, because Government employees were not available and because the purchase order cited the First War Powers Act. The availability of Government employees, or the ability to hire them by civil service processes, was not even mentioned in another important janitorial services case two years later.[119]

That the work intended to be contracted out is or was once done by Government employees is relevant to the factor here considered. In 27 Comp. Gen. 503 (1948), the War Assets Administration reported it was winding up as an agency for the disposal of surplus property. It was required to retire voluminous records, and because of continuing reductions in force it was difficult to retain much less acquire competent personnel. The administration planned to contract with a private firm to assist in the retirement and disposal of records. The Comptroller General stated that the exceptions to the general rule against contracting for personal services have been primarily on the ground that employees of the Government were not available or not competent for the task at hand. He stated that he had been in correspondence with the Archivist of the United States and that that officer believed that the War Assets Administration had been doing quite well to date. This was enough to convince the Comptroller General that Government employees were available and were competent, and the proposed contract was disapproved. He added that because regular employees were performing the task, it was "abundantly clear" that the authority to hire experts and consultants was not available. However, in another case there was no objection on the grounds of the personal services rule or because the services were not those of experts and consultants when the War Assets Administrator wanted to contract with a firm of accountants to audit property disposal transactions.[120] It should need no emphasis that a large number of auditors are found among Government employees. To deepen the confusion, a contract for stenographic reporting services went off on the basis that the contract did not really call for personal services at all, but provided for a completed product, i.e., the transcript.[121]

4. End Product—The notion that if payment to the contractor were based on something else than the time he expended accomplishing the task the Comptroller General would not object to the

[119] Ms. Comp. Gen. B–82269, 5 April 1949.
[120] 26 Comp. Gen. 188 (1946).
[121] 26 Comp. Gen. 442 (1946).

arrangement started with the proposition that if what was paid for was a finished product then the services were not personal for purposes of the exception in section 3709, Revised Statutes, *supra*.[122] Warning that the notion was not a panacea for the woes of the executive agencies was promulgated the same year when it was opined by the Comptroller General that a contract for translations at ninety cents per one hundred words violated the act of 5 August 1882, *supra*, the Appropriations Act involved, and the Classification Act of 1923, *supra*.[123] In 17 Comp. Gen. 300 (1937), it was stated that the term "salary" as used in the appropriations act under consideration did not include amounts "paid in accordance with the terms of a nonpersonal service contract based upon the results to be accomplished rather than the time actually worked on the job covering not only the contractor's time but also the use of his facilities—office, staff, equipment, etc. . . ." This opinion (17 Comp. Gen. 300 (1937)) is cited in 26 Comp. Gen. 468 (1947) apparently as authority for the proposition that being paid on other than a time basis tends to show that the contract is not personal. Yet, in the cited opinion, how the contractor was paid was irrelevant to the question of whether the services were personal. That matter had already been taken care of; the only remaining question being the narrow one of whether the contract price was "salary." The same is true in 24 Comp. Gen. 414 and 924 (1945), also cited in 26 Comp. Gen. 468 (1947) for the same proposition—in each the question being whether an individual was an employee for purposes of an appropriation act, the question of whether the contract was for personal services having already been passed. Occasionally, however, the Comptroller General has relied on the fact that payment was not on a time basis to permit escape from the rule against contracting for personal services. That element was controlling in a contract for mowing lawns even where the Government supplied the mower.[124] It was of some persuasion in a contract for a telephone answering service where the rate was set irrespective of time or size of staff.[125]

It is common talk among procurement administrators in the executive departments that all one has to do to escape the structures of the rule is write the contract to provide for an end product, or payment on some basis other than time spent. There are a large number of opinions of The Judge Advocate General of the

[122] 6 Comp. Gen. 430 (1926).
[123] 6 Comp. Gen. 364 (1926). Accord, 26 Comp. Dec. 243 (1919).
[124] Ms. Comp. Gen. B–82269, 5 April 1949.
[125] Ms. Comp. Gen. B–58059, 13 July 1946.

Army stressing this factor.[126] In view of the paucity of cases where the factor loomed large, the number in which it could have been raised but was not, and the case with which almost all contracts may be written to provide for payment on other than time, little if any reliance should be placed thereon.

E. *Other Factors*

One of the chief difficulties with the compilation of factors found in 26 Comp. Gen. 468 (1946) and discussed above is that it is not exhaustive of all the factors which at one time or another have been found influential by the Comptroller General, vestiges of which influence may still obtain. Those factors are discussed below.

1. Contractor is Not an Individual—Early in the game the Attorney General made it clear that a contract with an organization rather than with an individual was not one for personal services and therefore exempt from the advertising requirement of section 3709, Revised Statutes, *supra*. He stated that although a contract may in some of its details call for personal services, this does not make the contract one for personal services. Thus when the contractor is in position to employ others to perform personal services there is no reason why the contract should not be competed for by bidders (15 Op. Atty. Gen. 538 (1876); id. 235 (1877)). The Comptroller of the Treasury found there was some confusion in the area, and that "contractors and various other persons performing services for the public, not as personal services, have been inadvertently treated as though performing personal services."[127] He cited the two opinions of the Attorney General just discussed and then reported that the personal services mentioned in section 3709, Revised Statutes, *supra*, would be performed by "a single person, or by firms." This conflict, if it was one, was eventually resolved; there is no exception in section 3709, Revised Statutes, *supra*, for organizations.[128]

---

[126] JAGT 1951/3977, 13 Jun 1951; *id.* 1951/4574, 20 Aug 1951; *id.* 1952/5926, 17 Jul 1952 (personal services even though paid on other than time basis); *id.* 1952/6631, 4 Sep 1952; *id.* 1953/3676, 28 Apr 1953 (not personal services where engineering report called for even if compensation was on time basis); *id.* 1953/3675, 28 Apr 1953; *id.* JAGT 1953/4519, 2 Jun 53 (electric accounting machine contract); *id.* 1954/7313, 20 Aug 1954; *id.* 1954/5250, 4 Jun 1954.

[127] 6 Comp. Dec. 314 (1899).

[128] 9 Comp. Gen. 169 (1929).

For the purposes of the Comptroller General's rule against contracting for personal services whether or not the contractor was an organization or an individual was a neutral circumstance in 6 Comp. Gen. 180 (1926). But in 6 Comp. Gen. 474 (1927), a contract was objected to because the work was not to be done by the contractor himself but by employees selected by him.[129] At least one commentator has stated that this is merely another aspect of the law of general and special employment. "Whenever firms and corporations furnish their personnel under circumstances whereby the Government acquires sufficient power of supervision over their actions, such personnel, are in terms of agency, specially employed by the Government, even though they remain at the same time employees of their general employer."[130] The trouble with this is that the Comptroller General has not articulated the concept in this fashion, and as with all factors entering the determination of whether a contract is one for personal services its application is erratic. For instance in 24 Comp. Gen. 924 (1945), a contract with a corporation for the services of one of its employees was at least in part saved from objection because it was indeed with the corporation and not the employee. Contracting with a firm or individual made no difference in 33 Comp. Gen. 143 (1953), but that the facilities of a firm were to be utilized caused the Comptroller General to reverse a previous determination that the services were personal in Ms. Comp. Gen. B–122596, 18 February 1955.

2. Congressional Authorization—Section 15, Administrative Expenses Act of 1946, has already been discussed, and it was there concluded that all might not agree with the Comptroller General's ruling that that statute had nothing at all to do with the policy that contracts may not be let for personal services. It has also been remarked above that the Comptroller General converted a statutory ceiling on Government employees into a ceiling on those individuals and contractor employees performing what he called personal services. However, sometimes statutory language or "Congressional intent" has permitted escape from the rule. An appropriations act which authorized expenditures for specified services without regard to section 3709, Revised Statutes, *supra*, "and the provisions of other laws applicable to the employment and compensation of officers and employees of the United

[129] Accord 22 Comp. Gen. 700 (1943).

[130] Mallow, *Experts and Consultants in Government*, 14 Federal Bar Journal 357 (1954).

States" was found to authorize an exception to the rule.[131] A statute which provided that the Internal Revenue Service could require bond if it provided for the "sale" of revenue stamps, the legislative history of which showed the Commissioner was given wide latitude "with respect to the method of collecting the tax" was of some influence in securing approval of a contract to supply lists of vehicle registrants and to address and mail notices.[132] In Ms. Comp. Gen. B–64966, 8 April 1947, it was said that the general rule was that appropriated funds are not available for obtaining from private contractors personal history statements on prospective Government employees in the absence of specific authority, but that exceptions were made where such purchase was necessary to the enforcement of a specific statute. Then, authority to make the purchase was granted because the appropriations act involved contained authority for the temporary or intermittent services of experts and consultants and because of the unquestioned necessity of securing trustworthy employees. The Secretary of War was not limited to the use of Government employees under a statute which directed him to have property appraised "by an appraiser . . . to be chosen by him."[133]

On the other hand, statutory authority to make such investigations as it determines necessary prevents the Securities and Exchange Commission from procuring the services of a state engineer to make such investigations. An act containing a special provision for holding hearings was believed to provide by implication that the reporting of those hearings was to be done by Government employees.[134] That one Government agency could not accomplish a statutory task without contracting for services thought to be personal was no excuse in 15 Comp. Gen. 951 (1936). Finally, authorization in an appropriations act to expend for "personal services" does not authorize the procurement of such services by contract (7 Comp. Gen. 106 (1927)).

3. Miscellaneous—Other criteria have been articulated by the Comptroller General but because of the infrequency of their occurrence are not believed to be of significant weight. There is apparently no objection to contracting for personal services if the Government gets them free.[135] The cost of the contract was per-

[131] 17 Comp. Gen. 300 (1937).
[132] 21 Comp. Gen. 388 (1941).
[133] 7 Comp. Gen. 531 (1928).
[134] 4 Comp. Gen. 977 (1925).
[135] 15 Comp. Gen. 1074 (1936).

suasive in one case.[136] That the contemplated contract was not for regularly authorized personal services was one factor producing disapproval in two other cases.[137] Whether the contract requires the services of a relatively large number of people, whether the Government might repurchase under the contract, and whether the Government has the right to hire and fire where found of some weight by The Judge Advocate General in one case.[138]

F. *Conclusion*

The legal adviser to one agency of the Government has concluded that "The basis, or bases, for the rule cannot be established from the review of the Comptroller General's opinions," and that "No definitive rule can be established to govern future decisions." These conclusions are accurate, but perhaps they can stand expansion. First it makes no difference whether in fact the arrangement being examined by the Comptroller General is for "personal services," whatever they may be. In 24 Comp. Gen. 924 (1945), the Comptroller General reported that he not infrequently authorized the procurement of personal services by contract. In 1954 he authorized the procurement by contract of the services of certain coffee inspectors, a service which he said was undoubtedly personal.[139] Thus, whether to permit an executive agency to enter into a contract for services which conceivably might be performed by persons hired under civil service regulations is truly a policy decision. That so contracting would be permitted when it was "substantially more economical, feasible or necessary by reason of unusual circumstances,"[140] or when it was dictated by "cogent considerations of . . . necessity, efficiency, and economy"[141] is now and probably has been the case at least since 1945. Whether this latest formulation represents any change of approach to the problem is doubtful. It probably means that the Comptroller General will himself determine whether contracting for personal services is necessary, feasible, or economical, and in arriving at that determination will employ all the factors he has used in the past. Thus, in the future as in the past, it will be next to impossible to predict with any degree of certainty whether a given arrangement will offend the

[136] Ms. Comp. Gen. 58059, 13 July 1946.
[137] 6 Comp. Gen. 134 (1926); 27 Comp. Gen. 503 (1948).
[138] JAGT 1954/7313, 20 August 1954.
[139] Ms. Comp. Gen. B–116975, 27 April 1954.
[140] *Ibid.*
[141] 36 Comp. Gen. 338 (1956).

Comptroller General's policy. This dilemma stems immediately from the Comptroller General's remoteness from the agencies charged with procurement. Quite clearly the executive officer charged with getting a job done may have a different concept of what is necessary, efficient, or economical than will an accounting officer charged with settling and adjusting claims and certifying balances. That there are policy considerations of considerable significance inherent in a decision to contract for personal services cannot be gainsaid. Where Congress has not spoken, they would seem to be policies for consideration by the executive.

THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

By Major Lawrence H. Williams*

Emma Lazarus in "The New Colossus" wrote:

> "Give me your tired, your poor, your huddled masses yearning to breathe free. The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door."

To those individuals of the military services, both civilian and military, to whom all other avenues of redress for the adjustment of their personal grievances are either exhausted or otherwise closed, the words quoted above from the inscription at the base of the Statue of Liberty are not inappropriate to describe the Army Board for Correction of Military Records.

I. HISTORY OF THE BOARD

The Army Board for Correction of Military Records (hereafter referred to as the ABCMR or the Board) was established, pursuant to Section 207 of the Legislative Reorganization Act of 1946,[1] in a successful attempt by the Congress to free itself from the burdens of private relief legislation concerning military and naval records. Section 207 also established similar boards in the Air Force, the Coast Guard and the Navy. Prior to their establishment, upon the exhaustion of the administrative remedies available within a military department, an aggrieved individual was left to court action if the matter was justiciable (which it often was not) or to private relief legislation. This latter process, which was usually unsuccessful, was time consuming both for the Congress and the individual. It often meant private relief bills introduced by Members of Congress, sometimes reluctantly, at several sessions of the Congress, personal appearances of the individual and other witnesses before numerous committees, and not infrequently a veto by the President after passage of the legislation by the Congress. Accordingly, the Congress, in accordance with its desire to streamline its own operations, enacted the following sections in the Legislative Reorganization Act of 1946.

> "Sec. 131. No private bill or resolution *** authorizing or directing *** the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives."

---

*Chief, General Law Branch, Military Affairs Division, Office of The Judge Advocate General. Member of the Bars of Colorado, the Court of Military Appeals, and the Supreme Court of the United States.

[1] Act of 2 August 1946, 60 Stat. 837.

> "Sec. 207. The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice."

In 1951, Section 207 was amended[2] primarily to provide that, under procedures approved by the Secretary of Defense, payment of claims arising from the correction of records could be made. The present citation for Section 207, as amended, is title 10, United States Code, section 1552. The current departmental regulations governing the Board are Army Regulations 15–185, 18 July 1955.

Since its establishment in 1947, the Board has received more than 18,000 applications for correction of individual military records. Approximately half of these have come from individuals who have received dishonorable or bad conduct discharges, and the balance have covered a wide variety of alleged errors or injustices, chief among which are eligibility for disability retirement. More than 2,000 changes of individuals' records have resulted from formal hearings by the Board, and over $2,500,000 has been paid as a result of such corrections.[3] The ABCMR considers a range of cases as inclusive as the number of possible actions affecting Army personnel. As stated by Mr. Gordon D. Taft, Chairman of the Board:[4]

> "The Army Board for Correction of Military Records has received applications from individuals varying in age from 15 to 85 years and from widows, legal representatives and next of kin including children and grandchildren of servicemen and former servicemen in grades of recruit to lieutenant general. The periods of service involved have extended from the Revolutionary War to the current year, and petitions have covered almost every conceivable phase of experience in a soldier's career."

II. REVIEW BY THE ABCMR OF CONVICTIONS OF COURTS-MARTIAL

Soon after enactment of Section 207, there arose the question whether the ABCMR could review courts-martial cases. In his first decision on Section 207,[5] the Attorney General reviewed the several classes of private relief legislation considered by the Congress for members or former members of the military

[2] Act of 25 October 1951, 65 Stat. 655.

[3] Statistics furnished by Mr. Gerald Cowden, Staff Assistant to the Assistant Secretary of the Army (MP&RF); formerly Executive Secretary of the ABCMR.

[4] Memorandum of Chairman, ABCMR, 4 December 1957.

[5] 40 Ops. Att'y Gen. 504 (1948).

services, and answered the questions presented by stating that Section 207 was designed to cover all cases formerly the subject of private relief legislation. He went on to state that Section 207 was broad enough to cover not only the correction of a record reflecting a dishonorable discharge but also to cover the issuance of an honorable discharge certificate to the applicant after such correction. That opinion also stated pertinently:

> "On the other hand, the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings, and judgments of courts martial so as to disturb the conclusiveness of such judgments, which has long been recognized by the courts."
>
> ". . . . I may add that I have no doubt that in considering the necessity and propriety of providing for relief under section 207 in any particular case or class of cases you are entitled to take into account the need for maintaining systems of courts martial which will provide effective disciplinary measures as well as insuring justice to the individual. It was clearly not the intention of the Congress to make mandatory, upon requests by interested parties, the indiscriminate and wholesale reexamination of discharges or dismissals by reason of sentences of general courts martial. The remoteness of the time of the sentence, the improbability in such a case that the equities could be more fairly determined upon a reexamination, and the practical efficacy or usefulness of a present extension of clemency are factors which may properly be considered. Furthermore, section 207 is not to be regarded as superimposing a further means of review, freely available, upon the procedures previously set up. For example, a soldier sentenced to death by court martial, whose sentence has been examined and approved by the Secretary of War and by the President, is not given by section 207 an automatic stay of execution or any right to further review. The regulations established under that section may, and in my opinion should reflect these considerations.
>
> "For the foregoing reasons it is my opinion that entries in naval and military records resulting from the actions of general courts martial come within the purview of section 207 of the Legislative Reorganization Act, at least to the extent hereinbefore indicated."

As may be seen, the first paragraph of the above quotation states the belief that Section 207 cannot be used to disturb the conclusiveness of judgments of courts-martial. Exactly where such a disturbance begins has been a fruitful subject of conjecture.[6] The Judge Advocate General of the Army has taken the position[7] that the substitution of an honorable discharge "or other action looking to a change in the legal effects of the sentence" is within the power of the Board and would not dis-

[6] See, "Some Principles Governing the Board for Correction of Naval Records and the Federal Statute Creating It. A Legalistic Approach," Overton Harris, 42 Georgetown Law Journal 210-240 (1954).

[7] JAGA 1956/7277, 25 September 1956.

turb the conclusiveness of a trial by court-martial. In another case,[8] the same view was stated thusly:

"In consonance with these opinions of the Attorney General, this office has expressed the opinion that the Army Board for the Correction of Military Records, or the comparable boards in the other military departments, not being established as appellate tribunals in the court-martial system, may not determine that the proceedings, findings, or sentence of a court-martial are erroneous, nor recommend that they be declared null and void. If, however, the Board determines that an injustice has been effected by the imposition of a particular sentence, the Board may legally recommend that military records, other than the records pertaining directly to the court-martial trial and appellate proceedings, be corrected to effect a change in the results of a sentence, as distinguished from the sentence itself. This is not considered a reopening of or a collateral attack upon the judgment of the court-martial, but rather is considered in the nature of an act of clemency, comparable to a successful appeal to the Congress for relief by private legislation.

"5. It is believed that The Judge Advocate General of the Air Force is in general agreement with the views of this office set out above. In an opinion dated 14 January 1952 (Op JAGAF 1952/5; 1 Dig. Ops., Records and Reports, sec. 16.7), he stated that the correction of entries in Air Force records resulting from court-martial proceedings, where such action is necessary to correct an error or remove an injustice, comes within the province of the Air Force Board for Correction of Military Records. He stated further, however:

'. . . . Technically, the correction of a record to remove a reference to a conviction by court-martial does not disturb the finality and conclusiveness of proceedings, findings and sentence (40 Ops Atty Gen 504, supra), but for all practical purposes the error or injustice would be effectively corrected insofar as that is possible.' "

The Judge Advocate General of the Army, when requested to provide an operating guide to clarify the power of the ABCMR in cases involving convictions by courts-martial, stated:[9]

"2. The statute creating the Board and prescribing its authority cannot be interpreted as permitting the reopening of the proceedings, findings, and sentences of courts-martial so as to disturb their conclusiveness. The Federal courts have long recognized the principle that such proceedings, findings, and sentences may not be disturbed or reviewed except by an appellate tribunal within the same judicial hierarchy, if the court in question had jurisdiction over the person and offense and jurisdiction to adjudge the sentence imposed. This principle is now specifically recognized in Article 76, Uniform Code of Military Justice. The Board, being an administrative body not included in the court-martial system, may not, therefore, question the validity of such proceedings, findings, and sentences. Specifically, it is legally objectionable for the board to find an *error* in such cases, or to recommend that the proceedings, findings, or sentence be declared null and void.

[8] JAGA 1956/5599, 9 July 1956.
[9] JAGA 1956/2452, 2 March 1956.

"3. This is not to say that the Board is powerless to act should it consider that an *injustice* has been done. Such action should be designed, however, to effect a change in the *results* of a sentence, rather than a change in the sentence itself, and will be considered an act of clemency. It is considered that such action by the Board may legally take one or more of the following forms:

a. Recommendation that the records be corrected to show issuance of an administrative discharge rather than a punitive discharge or dismissal;

b. Recommendation that the records be corrected to show discharge on some date subsequent to the actual date of discharge;

c. Recommendation that the records be corrected to show that all or any part of confinement adjudged had been remitted;

d. Recommendation that the records be corrected to show that all or any part of the forfeitures or fine adjudged had been remitted;

e. Recommendation that the records be corrected to show that the applicant had served as a member of the Army in the active military service of the United States for all or any part of the period subsequent to the date the sentence was adjudged;

f. Recommendation that the records be corrected to show that time lost under the Act of 4 June 1920 (41 Stat 809), as amended (10 USC 1579) was not time so lost.

g. Recommendation that the records be corrected to show that the applicant was not reduced in grade as the result of the sentence of a court-martial.

h. Recommendation that the records be corrected to show that reprimand or admonition adjudged as punishment by the court-martial has been withdrawn."

Lest anyone imagine that the Board is overly liberal in its correction of records in cases involving courts-martial, the following reply[10] was recently transmitted by the Office of The Judge Advocate General to a Staff Judge Advocate who inquired concerning the recharacterization of punitive discharges by the Board:

"The percentages set forth below were computed from statistics maintained by the Army Board for Correction of Military Records from the date of its organization (1946) through 28 February 1959. Available data do not distinguish, however, between cases wherein a dishonorable discharge was executed and those wherein a bad conduct discharge was involved.

"Pertinent percentages follow:

a. Of total applications received by the Board to 'upgrade' punitive discharges, those denied without granting a hearing: ---------- 92.6%

b. Of total applications received on which change of the executed punitive discharge was denied following a formal hearing by the Board: ---------- 1.9%

[10] JAGA 1959/2319, 12 March 1959.

c. Of total applications received, where executed punitive discharge following a formal hearing was 'upgraded' to:

(1) an undesirable discharge	2.6%	
(2) a general discharge	1.7%	
(3) an honorable discharge	0.9%	5.2%

d. Other cases in which some type of relief was granted: 0.3%"

There remain several unanswered questions concerning the power granted under Section 207 with respect to courts-martial. Among these are whether sentences to confinement then being served can be changed so as to release a prisoner from confinement. So far as the writer knows, no such relief has been granted to this date. May a conviction be expunged entirely? The Comptroller General has held something very close to this in a decision,[11] stating that Section 207 could be used to remove the record of an appellant's conviction by a court-martial so as to enable him to receive retirement pay, such pay previously having been denied him under a statute[12] barring the receipt of retirement pay by Government employees upon conviction of certain felonies.

III. REVIEW BY THE ABCMR OF MATTERS OTHER THAN COURTS-MARTIAL

A. *Opinions of the Attorney General (other than courts-martial cases).*

The Attorney General has been called upon to interpret Section 207 in a variety of cases other than those resulting from courts-martial. Those opinions have uniformly held that Section 207 granted broad powers equivalent to those of the Congress in the field of private legislation concerning military and naval records. He indicated that the types of former private relief legislation could serve as guideposts for the limits on Section 207 authority.

In an opinion to the Secretary of the Navy,[13] the Attorney General considered the question whether Section 207 authorized the reappointment of a former Marine officer whose withdrawal of resignation had been inadvertently filed without action. The Attorney General held that the restoration of the officer to his former position was not authorized by Section 207, as the appointment of officers in the Regular Marine Corps was by the President, by and with the advice and consent of the Senate. This view was in keeping with precedents established by prior

[11] 35 Comp. Gen. 302 (1955).
[12] Act 1 September 1954, 68 Stat. 1142, as amended, 5 U.S.C. 2281.
[13] 41 Ops. Att'y Gen. Op. No. 50 (1948).

private relief legislation which authorized the President to reappoint officers whose termination of status had been found by the Congress to have been unjust.

In the next opinion rendered,[14] the Attorney General had for consideration whether Section 207 authorized further action with respect to a case previously considered by a statutory board specifically established to review administrative discharges. The Attorney General held that such power existed despite the fact that the language establishing the statutory board in question provided that its findings shall be "final subject only to review by the . . . Secretary of the Navy . . . ." The reasoning therefor was that the statutory board in question could not take such action as to preclude private relief legislation, and that, accordingly, Section 207, which had taken the place of private relief legislation, could be applied.

Subsequently, the Attorney General considered[15] whether Section 207 authorized the change of Army records so as to show the date of appointment of a Reserve Officer to the grade of lieutenant colonel to have been 12 April 1946 rather than 4 August 1948. (Such officer would have been appointed on the earlier date but for improper entries in his records, which had been removed by the ABCMR.) The Attorney General held that, as such appointment was already in existence, no retroactive appointment beyond the power of the Congress was involved, and that all that remained was to adjust the effective date of entitlement to the rights and privileges of the office concerned.

The following year the Attorney General rendered a far-reaching and interesting opinion on Section 207.[16] That opinion concerned a deceased enlisted man, Sergeant James W. Grose, whose widow and son applied to have his date of retirement changed from 4 September 1916 to 2 June 1916. On 12 May 1916, Grose, serving in the Philippine Islands as a sergeant, first class, Hospital Corps, applied for retirement. His application reached Washington on 28 June 1916 and was approved on 12 July 1916. He was actually retired on 4 September 1916. In 1927 there was enacted a law[17] which provided that "sergeants, first class, Hospital Corps, retired prior to 3 June 1916" shall be "placed in the first grade" (master sergeant). As Sergeant

[14] 41 Ops. Att'y Gen. Op. No. 1 (1949).
[15] 41 Ops. Att'y Gen. Op. No. 57 (1951).
[16] 41 Ops. Att'y Gen. Op. No. 19 (1952).
[17] Act 3 March 1927, 44 Stat. 1356.

Grose was not retired until after 3 June 1916, he was not eligible for such advancement. He sought legislative relief but was not successful. He also sought relief in the Court of Claims but that Court (although finding strong equity in Grose's claim that because of the distances involved his retirement was not effected before 3 June 1916) held[18] that it was without power to enlarge the 1927 statute. The Board found that the placing of former Sergeant Grose on the retirement list subsequent to 3 June 1916 had worked an injustice on him. The Attorney General held that Sergeant Grose's case is one "involving precisely the kind" of correction of a military record that the Congress had intended. That opinion went on the state:

> "The power granted by section 207 is to 'correct' a record, and the purposes for which such correction may be made are two-fold: 'to correct an error,' or 'to remove an injustice.' The words 'error' and 'injustice' are not defined in the act, and there is no indication that the Congress intended any limited or technical meaning for them here. It has been suggested that the 'error' or 'injustice' must be caused by the service involved before such error or injustice may be made the basis of remedial action under section 207. But such a construction appears to me not only to effect an unjustified and gratuitous limitation on the power conferred by the plain language of the section, but actually to contradict the intention of the Congress to which I have already referred. The suggested limitation is not necessary, in my opinion, in order to sustain the validity of section 207 against a challenge of unlawful delegation of legislative authority by the Congress. The standards 'to correct an error' and 'to remove an injustice' are in my judgement sufficient. See *Lichter v. United States*, 334 U.S. 742, 774–787 (1948), and cases there cited.
>
> "In my opinion, the responsibility for deciding whether the disadvantage suffered by Sergeant Grose in the circumstances does or does not constitute an 'injustice' to be removed under section 207 rests, under that provision, on you, acting through the Army Board on Correction of Military Records. If that Board, properly constituted and functioning under procedures, set up by you in accordance with section 207, determines that this case does involve an 'injustice' that may be removed by the recommended correction of Sergeant Grose's record, I deem such correction to be authorized under the statute. For the actual making of that determination, the responsibility, of course, remains with you and the Board."

In the last published Opinion of the Attorney General on Section 207,[19] there was considered the question whether the Administrator of Veterans' Affairs was required to honor a substitute certificate issued by the Secretary of the Army on 13

[18] *Grose v. United States*, 97 Ct. Cl. 383 (1942).
[19] 41 Ops. Att'y Gen. Op. No. 35 (1954).

August 1953, so as to entitle a former enlisted man to World War I benefits.

The facts of the case were that the applicant for relief had been given a dishonorable discharge during World War I. The Board found the dishonorable discharge to be unjust and recommended that his records be corrected to show the issuance of an honorable discharge on 30 April 1919. This was approved by the Secretary of the Army. Upon further application, the Board found the applicant should have received the benefits of the World War Adjusted Compensation Act. The Board concluded that the applicant would have applied for compensation under that Act if he had then possessed an honorable discharge. Accordingly, they recommended that his Army records be corrected to show his timely application for such benefits as of 2 January 1940, and that a certificate so stating be transmitted to the Administrator. The Secretary of the Army approved and so directed on 5 May 1953. The Veterans Administration held the view that Section 207 did not grant such authority, and refused to honor such certificate. The Attorney General held that Section 207 required the certificate in question to be honored, stating:

"It appears from the submission that some persons with dishonorable discharges disregarded official advice that they were ineligible for adjusted compensation and, nevertheless, filed applications on or before January 2, 1940. Subsequently, their discharges were changed to honorable in section 207 proceedings and their timely applications for adjusted compensation were then processed. It would seem unreasonable to attribute to the Congress an intent to so circumscribe the administrative remedial power as to disadvantage those who heed official advice and advantage those who disregard it. Or, to put it another way, it would seem more likely that Congress intended the remedial power to be adequate to place both groups, at least, on an equal footing.

"It has been suggested that the relief provided is without your power because it involves the creation rather than the correction of a record. This suggestion seems to me without substantial force. The act does not define the term 'correct' but it would be plainly inconsistent with its purpose to give it a narrow or technical meaning. Cf. 41 Op. A. G. No. 19, p. 4. Further, in a certain sense, the correction of any record involves the creation of a new one. However, there is no indication the Congress intended that fact to bar an otherwise appropriate remedy. On the contrary, it is made reasonably clear by the legislative history of the 1951 amendment to section 207 that such was not the legislative intent. In hearings on H.R. 1181, which became the act of October 25, 1951 (65 Stat. 655), it was pointedly called to the House Committee's attention by a representative of the Comptroller General, that service boards 'apparently have taken jurisdiction not only to correct records but also to "create"

records which are patently contrary to fact . . . . Hearings before Subcommittee No. 3, House Committee on Armed Services, 82d Cong., 1st sess., p. 366 (for further amplification and discussion of this point in the hearings see *ibid.*, pp. 371, 373, 374, 375, 376, 379, 380, 387). Nevertheless, the Congress did not limit in that respect the corrective remedial power as, theretofore, construed and exercised.

"For all the foregoing reasons, it is my opinion that the correction of Hamel's record in issue was within the authority the Congress granted in section 207."

B. *Opinions of the Comptroller General (other than courts-martial cases).*

The Comptroller General has rendered many decisions concerning the power granted under Section 207 with respect to matters other than courts-martial. Prior to amendment of Section 207 in 1951,[20] he had expressed the view several times[21] that Section 207 did not authorize payment of claims based upon corrections of records thereunder. As a result of his decisions, the Congress amended Section 207 to so provide specifically. Subsequent to the amendment to Section 207, the Comptroller General held[22] that officers determined under Section 207 to have been unfit at the time of their relief from active duty could be granted retirement pay retroactive to the dates of relief from active duty, but that such must be done by a proper change of their records, and could not come about by a mere correction of records to show an amount due; in other words, the retirement pay would flow from the proper correction of records and in no other way.

In consonance with such views, in a later decision,[23] the Comptroller General held that Section 207 did not authorize actions to correct records but withhold monetary benefits (such as retroactive retirement benefits) occurring from such corrections. As stated in that opinion:

"In view of the reasonably clear and unambiguous language of section 207, as amended, and the obvious purpose of the Congress as evidenced by such language and the history of the 1951 amending act, the conclusion is required that the Secretaries of the departments concerned are not vested, impliedly or otherwise, with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records and that the amounts lawfully authorized to be paid under section 207(b), pursuant to the correction of military or naval records are not dependent upon either the judgment

[20] See footnote 2, *supra.*

[21] *E.g.*, 27 Comp. Gen. 665 (1948); 27 *id.* 711 (1948); 28 *id.* 357 (1948); 28 *id.* 678 (1949).

[22] *E.g.*, 32 Comp. Gen. 242 (1952); 32 *id.* 294 (1952); 33 *id.* 171 (1953).

[23] 34 Comp. Gen. 7 (1954).

or the generosity of such Secretaries in any particular situation but depend solely on a proper application of the statutes to the facts or purported facts as shown by the corrected record in the particular case.

"In the decision of November 4, 1953, in the Kimbrough case, above referred to, it was held by this Office that by reason of the correction of his military records pursuant to the provisions of section 207(a), to show that on January 6, 1946, Kimbrough was permanently incapacitated for active service by reason of physical disability, incurred in line of duty, as the result of an incident of the service and that on January 6, 1946, he was relieved from active duty by reason of physical disability and certified to be eligible for retirement pay benefits under the provisions of the act of April 3, 1939, 53 Stat. 557, 10 U.S.C. 456, the said officer's right to retirement pay was required to be determined as if he actually had been released from active duty on January 6, 1946, by reason of permanent physical disability, incurred in line of duty, and immediately certified to be eligible for the retirement pay benefits prescribed in the said act of April 3, 1939. Hence the direction by the Secretary of the Army that the Department of the Army pay to Captain Kimbrough retroactive retirement pay effective only from and after May 1, 1950 (presumably based on the judgment of the Secretary of the Army that payment of retirement pay from that date would, in the circumstances of the case, afford an adequate measure of relief) did not affect the amount of disability retirement pay which would otherwise have become due to Captain Kimbrough, under the applicable provisions of law, had no error or injustice initially occurred in his case. Accordingly, Captain Kimbrough was deemed to be legally entitled to retirement pay beginning January 7, 1946, on the basis of the correction of his military records and consequently his claim was allowed by the General Accounting Office for the period from January 7, 1946, to April 30, 1950, inclusive, the record indicating that payment of retirement pay would be made by the Department of the Army for the period effective from and after May 1, 1950. In the opinion of this Office, that action was correct and was required by law."

This decision, and later decisions of the Comptroller General, disclose his recognition of the broad powers granted under Section 207, and in effect supersede his earlier, stricter views.[24] He has now agreed that Section 207 grants the power to place an officer on the Temporary Disability Retirement List,[25] to authorize a Naval officer the right to elect contingency option and other benefits when retired retroactively for physical disability,[26] to correct the records of a deceased sergeant to show his retirement as a major for physical disability, and to grant survivorship benefits to his widow based upon the grade of major,[27] to show that an eye injury sustained by a Naval Re-

[24] See footnote 21, *supra*.
[25] 34 Comp. Gen. 87 (1954).
[26] 34 Comp. Gen. 646 (1955).
[27] 35 Comp. Gen. 77 (1955).

servist prior to a scheduled drill was sustained during the scheduled drill so as to grant entitlement to disability retirement benefits,[28] and to correct records to authorize an election in 1955 of retirement pay options (the options having expired by law in 1954), by an Air Force officer retired in 1955 retroactively as of 1948.[29]

As stated above, the Comptroller General has recognized generally the broad powers granted by amended Section 207. However, his guideposts are not, as are those of the Attorney General, whether the Congress could have enacted private relief legislation thereon prior to 1946. For example, as set out above, the Comptroller General has ruled[30] that Section 207 does not authorize a correction of records accompanied by a withholding of monetary benefits (on the basis that adequate relief would be furnished without retroactive pay), something which the Congress was authorized to do, and did.[31]

C. *Opinions of The Judge Advocate General (other than courts-martial cases).*

The Judge Advocate General of the Army, in accordance with the opinions of the Attorney General and Comptroller General, also recognizes the broad powers granted under Section 207. Accordingly, The Judge Advocate General has expressed the view that Section 207, in cases of error or injustice, authorizes the correction of records so as to grant physical disability retirement pay to members of the Army released without pay or with less disability retirement pay than they were entitled to;[32] to entitle dependents to family allowance benefits;[33] to delete an entry in preinduction physical examination records showing psychoneurosis;[34] to change "line of duty" findings;[35] to reimburse an officer whose household goods were shipped to other than his proper home at the time of retirement;[36] to show retirement for physical disability even though an enlisted man had applied for, and been granted, retirement for length of service;[37] to correct personal records concern-

[28] 35 Comp. Gen. 508 (1955).
[29] 36 Comp. Gen. 547 (1957).
[30] See footnote 23, *supra*.
[31] *E.g.*, 19 Stat. 408; 19 *id.* 467; 20 Stat. 37; 20 *id.* 321; 20 *id.* 324; 20 *id.* 354; 20 *id.* 470.
[32] JAGA 1952/8072, 22 October 1952; *id.* 1953/6181, 7 August 1953; *id.* 1953/8325, 22 October 1953.
[33] JAGA 1952/3690, 5 May 1952.
[34] JAGA 1953/2254, 25 March 1953.
[35] JAGA 1953/2564, 27 March 1953.
[36] JAGA 1950/2767, 20 April 1950.
[37] JAGA 1954/2772, 23 April 1954.

ing a court-martial of a civilian employee of the Army (military records being construed to include all records of the Army);[38] to correct an enlisted man's records to show honorable service during a period he was serving a sentence to confinement;[39] to show an automobile was transported with proper authority in order to preclude the applicant's having to pay transportation costs (record "created" rather than corrected in this case);[40] to show an enlisted man was not reduced under Article 15, UCMJ, and continued to hold the grade in question from the date originally promoted thereto;[41] to show the appointment as an officer and entry on active duty on 27 August 1953 of a doctor, who was subsequently commissioned, thereby transmuting his induction as an enlisted man on that date into an appointment as an officer, the officer thereby becoming entitled to an officer's pay, including special pay for medical personnel, from the mentioned date;[42] to show that an applicant, who did not report with his National Guard unit during World War I because of sickness, did report, to delete all references to desertion in his records, and to issue him an honorable discharge;[43] and to issue an honorable discharge to an alien who attached himself to an Army unit during the Philippine Insurrection under such circumstances as not to effect a constructive enlistment.[44]

In other opinions, The Judge Advocate General has expressed the view that Section 207 authorizes the correction of records so as to grant an honorable discharge after review and rejection of an applicant's request by the Army Discharge Review Board;[45] to grant physical disability retirement after unfavorable actions by the Army Physical Review Council, the Army Physical Disability Appeal Board or the Army Disability Review Board;[46] to revoke an election of an officer under the Uniformed Services Contingency Option Act of 1953;[47] to show an applicant's entitlement to certain medical services rendered in a civilian hospital;[48] to credit the prior Regular Navy service of an

[38] JAGA 1955/2587, 4 March 1955.
[39] JAGA 1955/5381, 16 June 1955.
[40] JAGA 1954/1948, 2 March 1954.
[41] JAGA 1955/8275, 20 October 1955.
[42] JAGA 1955/9268, 15 November 1955.
[43] JAGA 1947/3331, 5 May 1947.
[44] CSJAGA 1949/5244, 20 July 1949.
[45] JAGA 1951/6920, 16 November 1951.
[46] JAGA 1952/2835, 17 March 1952.
[47] JAGA 1955/9949, 7 December 1955.
[48] JAGA 1956/4097, 4 June 1956.

applicant as if it were Regular Army service and adjust his place on the promotion list accordingly;[49] to show an applicant was reappointed as a Reserve officer at an earlier date than he was, the officer's reappointment not having been effected due to loss of his address;[50] to show a member's retirement at a date not in accordance with retirement date laws requiring retirement on the first day of a month;[51] to show an enlisted man served an additional eight days of active duy so as to reflect the five years of service necessary for certain naturalization benefits;[52] to review efficiency reports where applicant has exhausted his administrative remedies (i.e., application to TAG);[53] to reflect attendance at a Reserve drill so as to entitle a Reservist to pay and other benefits;[54] to show an officer's relief from active duty to have been involuntarily in order to entitle him to readjustment pay;[55] to show a Reservist had been placed in the Retired Reserve rather than discharged from his Reserve commission;[56] to reflect prior Navy commissioned service to be Army commissioned service in order to make the applicant eligible for Regular Army appointment;[57] and to show that a retired colonel who had held the temporary rank of major general and then reverted to the grade of colonel retired as a major general rather than as colonel.[58]

IV. DECISIONS OF THE COURTS

Section 207 has also been the subject of interpretation by the courts, and, as has been man's experience ever since the Phoenicians invented money, that interest has centered around the correction of records involving compensation. As might be expected, the Court of Claims has provided the majority of decisions interpreting Section 207. A few of the more important decisions concerning Section 207 will be noted here.

In a decision[59] concerning one Uhley, a former Air Force officer injured while bailing out of an airplane in combat during World War II, the Court of Claims refused to dismiss the suit as requested by the Government, because, in the words of the Court

[49] JAGA 1957/4155, 26 April 1957.
[50] JAGA 1957/5170, 25 June 1957.
[51] JAGA 1959/1130, 21 January 1959.
[52] JAGA 1956/8381, 7 December 1956.
[53] JAGA 1957/6612, 8 August 1957.
[54] JAGA 1957/6649, 3 September 1957.
[55] JAGA 1957/8322, 12 November 1957.
[56] JAGA 1957/9167, 10 January 1958.
[57] JAGA 1958/6066, 14 August 1958.
[58] JAGA 1958/8344, 22 December 1958.
[59] *Uhley* v. *United States*, 128 Ct. Cl. 608 (1954).

of Claims, an Air Force Board for the Correction of Military Records and the Secretary of the Air Force "arbitrarily, capriciously and without support of any evidence and contrary to the evidence found, that plaintiff was not permanently incapacitated for active military service at the time of separation, as in fact he was. . . ." Accordingly, the Court ordered a trial on the merits. The case was thereafter tried on its merits before a commissioner of the Court of Claims and a reversal of its prior decision was then rendered by that Court.[60] In that decision, the Court, by the same judge who wrote the prior decision, stated that there had in fact been thorough consideration of the case by the medical authorities, the Air Force Board for the Correction of Military Records, and the Secretary of the Air Force, that the plaintiff had not shown any evidence of arbitrary or capricious action by Air Force officials (the Court did not mention that it had found such in its previous decision), and that it could not "undertake to determine who is fit or unfit to serve in the Armed Forces."[61]

In a subsequent case[62] in which a former enlisted member of the Army had been granted relief under Section 207, it was held that such relief (i.e., issuance of an honorable discharge on 28 January 1952 in lieu of a dishonorable discharge issued on 9 July 1945) did not serve to retain him in the Army during the period 1945–1952 so as to entitle him to pay and allowances.

The question of arbitrary and capricious action was again raised in a case[63] brought by an Army Reserve officer seeking disability retirement whose application for relief under Section 207 had been denied without granting him an appearance before the ABCMR. The Court noted that Section 207 does not require that a hearing be granted, that the ABCMR had all of the applicant's medical records before it, and that the ABCMR had found no basis for relief. The Court, however, reiterated its power to grant relief to a party aggrieved by the arbitrary or

[60] *Uhley v. United States*, 137 Ct. Cl. 276 (1957).

[61] The Court apparently overlooked or disregarded this principle in both prior and subsequent decisions. See *Proper* v. *United States*, footnote 66, *infra; Friedman* v. *United States*, footnote 68, *infra*, and cases cited therein, for cases of the Court of Claims overruling medical authorities in determining medical unfitness of members of the Armed Forces, and granting retirement pay based upon such unfitness.

[62] *Goldstein* v. *United States*, 131 Ct. Cl. 128 (1955); *cert. den.* 350 U.S. 88 (1955).

[63] *Wales* v. *United States*, 132 Ct. Cl. 765 (1955).

capricious act of a Government official but stated that such was not the case here.

In a case[64] decided shortly after the second decision in the Uhley case, *supra*,[65] an Army nurse injured in a jeep in 1944 had appeared before a Disposition Board in 1945, which Board found her fit for active duty. She was subsequently relieved from active duty in 1945, though not for physical disability. In 1953 she applied under Section 207 for retirement which application for relief was not granted. The Court, in denying her relief, stated it had no jurisdiction in the matter "unless the Board and the Secretary acted arbitrarily, or otherwise unlawfully."

The question of review of Section 207 actions in disability retirement cases was again raised in an interesting way in a subsequent case.[66] An Army Reserve officer contracted multiple sclerosis possibly at some time between 1936 and 1946 while serving on active duty. He was later released from active duty, though not for physical disability. In 1953, the diagnosis of his ailment was made, and in 1955, the ABCMR (by a three to two vote) recommended that he be retired for physical disability. The Secretary of the Army supported the minority position of the ABCMR and denied retirement to him. The Court's decision (another three to two vote) held that the decision of the Secretary was arbitrary and capricious, and granted retirement pay to the applicant. The facts as stated by the Court indicate a reasonable basis for decision either way by the Secretary of the Army. The majority decision itself, prior to finding arbitrary and capricious action, devotes several pages to the facts upon which the Secretary of the Army based his conclusions. The Court noted[67] the fact that a Secretary may overrule recommendations of such a board where its findings are not justified, but held that such was not the case here. The minority opinion of the Proper case, which it is submitted was the correct one, reads as follows:

> "What the majority has done in its opinion amounts to reviewing the actions of the Secretary as an appellate court would review the decision of a lower tribunal. It has reviewed his decision, denying the plaintiff retirement and, consequently, retired pay, not only on a question of law but also on the facts. In effect, the majority says that the minority opinion of the Army Board for Correction of Military Records was wrong, and the majority opinion was right, and that the Secretary was arbitrary in not adopting the majority opinion.

[64] *Price* v. *United States*, 137 Ct. Cl. 685 (1957).
[65] See footnote 60, *supra*.
[66] *Proper* v. *United States*, 139 Ct. Cl. 511 (1957).
[67] *Id.* at p. 526.

"But how can we say that the Secretary was arbitrary and capricious in adopting the view of the minority, and rejecting the view of the majority? Would the Supreme Court be justified in saying that judges of this court, who had dissented from the opinion of the majority, were acting arbitrarily in not having concurred with the majority?

"It is not for us to determine whether the majority of the Board for Correction of Military Records or the minority was correct. Jurisdiction to determine an officer's right to retirement is vested in the Secretaries of the Army, Navy and Air Force. It is not vested in us and we have no right to review their decision unless we find that they had acted arbitrarily. In my opinion, we can make no such finding in this case.

"Nor do I agree that the Secretary is bound by the action of the Board for Correction of Military Records. The Legislative Reorganization Act of October 25, 1951 (65 Stat. 655), does not vest in the boards for Correction of Military Records the right to correct an error or injustice. It vests that authority in the Secretary. It merely permits the Secretary to set up such boards to aid him in determining whether or not an error has been committeed or an injustice done. Section 207 (a) reads in part:

> The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, *** are authorized to correct any military or naval record where in *their judgment* such action is necessary to correct an error or remove an injustice . . . [Italics ours.].

This vests jurisdiction to correct the error or to remove the injustice in the Secretaries. The Act says that *they* 'are authorized to correct any military or naval record where in their judgment such action is necessary' etc.

"What I have omitted from the above quotation reads: 'under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments.' To me this means nothing more than that the Secretary may seek the aid of this board of civilian officers or employees of his department in order to arrive at a judgment; but, after all, the judgment to be rendered is the Secretary's judgment. He is not required to bow to the judgment of his subordinate officers and employees unless their judgment coincides with his judgment.

"If I am correct in this, it cannot be said that the Secretary was arbitrary in adopting the view of the minority and rejecting the view of the majority of this board he had set up. It cannot be said that his action was arbitrary unless the law bound him to accept the judgment of this board. I do not think it does."

In a recent case[68] the Court of Claims found arbitrary and capricious action on the part of the Air Force Board for the Correction of Military Records in that it sought the advice of the Executive Secretary of the Air Force Personnel Council, rather than basing its recommendations entirely on the evidence and records before it. The Court also stated in that case that Section 207 may not be used to review and reverse a decision

[68] *Friedman* v. *United States*, 158 F. Supp. 364 (Ct. Cl. 1958).

of another board (i.e., Physical Evaluation Board) favorable to the applicant but may only be used to correct errors or injustices against personnel. The Court further noted that the words of Section 207 providing that action thereunder shall be final and conclusive on all officers of the Government was not intended, and does not, preclude judicial review of such actions.

V. CONCLUSIONS

As may be seen from the above, the interpretation of Section 207 is by no means completed. The question of how far Section 207 can go without disturbing the conclusiveness of courts-martial is, in itself, a disturbing question which must await further interpretation or further legislative action. There also remains to be resolved the conflict between the Comptroller General's philosophy (i.e., that Section 207 must be rather strictly construed and hence, that compensation may not be denied in connection with a correction of records) and that of the Attorney General (i.e., that Section 207 must be liberally construed to authorize any form of relief for which the Congress could have enacted private relief legislation). However, the great majority of the actions of the Board are generally accepted as proper by all concerned. The writer, who has had in the course of his official duties numerous opportunities to observe the work of the ABCMR, is of the opinion that the staff and members of the ABCMR are experienced and able, that its recommendations are thorough and correct, and that they are processed in the Office of the Assistant Secretary of the Army (MP&RF)[69] in a proper manner. This accounts for the extremely few successful appeals to the courts from action taken under Section 207. As an example of what Section 207 can do to right injustices, the Board for Correction of Naval Records in the Egan case[70] determined that a former Marine Reserve officer was entitled to certain pay and allowances during World War II. The plaintiff, a Marine first lieutenant, while serving overseas in Samoa was hospitalized for bronchitis. The facts of the case, which the Court of Claims characterized as "unusual," were:[71]

> ". . . . Shortly after his admission to the hospital for treatment, another patient in plaintiff's ward made a violent attempt with a dangerous weapon upon the life of a Naval physician. Plaintiff, who was not seriously ill, intervened and disarmed the violent patient. In the course

[69] DA Memo 15–22, 30 January 1959, places supervision of the ABCMR in the Assistant Secretary of Army (MP&RF).

[70] *Egan* v. *United States*, 158 F. Supp. 377 (Ct. Cl. 1958).

[71] *Id.* at p. 379—381, 382—383.

of an investigation following that incident, the witnesses to what happened who were patients in the hospital at the time, denied that anything of the sort had occurred. It was later fully established that these witnesses lied. Plaintiff was also questioned by hospital doctors concerning two previous injuries which he had mentioned but which were not noted on his hospital medical record. Plaintiff had actually suffered the two injuries, had been treated for them by Army doctors, and had reported the injuries to the admitting physician of the hospital but, unaccountably, no record was made of this matter. The investigating physicians in the hospital made up their minds that plaintiff had imagined the ward encounter with the violent hospital patient and had also imagined the two injuries he claimed to have incurred. At about this time, plaintiff learned that his battalion had been ordered into combat. Plaintiff had recovered completely from the attack of bronchitis and asked to be discharged from the hospital to permit him to join his battalion. Hospital authorities refused to discharge plaintiff and his reaction was, naturally enough, quite violent. On February 17, 1943, the hospital physicians erroneously diagnosed plaintiff as insane and he was confined to the locked ward of the hospital.

". . . . Plaintiff's appointment as captain, effective March 1, 1943, with rank from February 28, 1943, was illegally withheld for the stated reason, which was erroneous, that 'he was sick in the U.S. Naval Hospital.' There is no indication that the promotion was withheld for any reason other than that plaintiff was then in the hospital and confined to a locked ward under an erroneous diagnosis of insanity. His previous attack of bronchitis was not a factor in this.

". . . . During the five months of plaintiff's confinements in locked wards as an insane person, he attempted in every conceivable way to persuade the medical officers that he was not insane. His growing sense of frustration and his occasionally vehement protests only served to confirm the medical authorities in their opinion that plaintiff was insane. Throughout plaintiff's confinements no technical tests administered to him by doctors resulted in the manifestation of any symptom of a psychiatric origin, or of any physical condition of a psychogenic origin.

"Not long after plaintiff's admission to Saint Elizabeths Hospital, he escaped and later returned armed with reports of several medical examinations attesting to his sanity. Plaintiff then appeared before a group of psychiatrists at Saint Elizabeths and told them that if he was held at the hospital he would seek a writ of habeas corpus. He was finally permitted to leave the hospital on October 30, 1943.

"In the meantime, on July 30, 1943, a Board of Medical Survey convened at Saint Elizabeths Hospital and rendered a report which contained the following statement of so-called *facts:*

> 'On admission to this hospital the patient was obviously making an effort to be as pleasant as possible but failed to conceal very definite tension, speaking very rapidly and lighting one cigarette from the other. He was intent upon establishing that he had no mental disorder and that he had been mistreated. He presented his case with considerable circumstantiality and detail, and made an especial effort to smooth over his past behavior difficulties, giving explanatory and personal

versions *of a paranoid nature.* [It is interesting to note in this connection that plaintiff's personal versions of what happened turned out to be the correct versions.] Since then he has shown improvement. He is still however, preoccupied with explaining his psychiatric difficulties on the basis of errors on the part of the physicians, who have handled his case. He needs further hospital care. His physical condition is good.

'Verified history reveals that this patient was discharged from the U.S. Army on March 3, 1942, because of a mental illness diagnosed, "Psychoneurosis, Anxiety, Neurosis, with Schizoid Features." In the opinion of this Board the origin of the patient's present disability existed prior to appointment and has not been aggravated by service conditions.' "The 'verified history' reported in the statement of facts of the Board of Medical Survey was the service and medical history of *another* John J. Egan, not this plaintiff, who had indeed been discharged from the Army on March 3, 1942 as an insane person. Despite the asserted verification referred to, this other Egan had a service serial number different from the serial number of plaintiff, and his discharge from the Army antedated plaintiff's by several months. This astounding piece of misinformation and carelessness was transmitted to the Board of Medical Survey by the Adjutant General of the Army through the Bureau of Medicine and Surgery.

"On the basis of the remarkable and untrue findings of fact quoted above, the Board of Medical Survey, without further inquiry into the matter, recommended that plaintiff appear before a United States Marine Corps Retiring Board 'in order that his best interests be fully protected', inasmuch as he was deemed to be permanently 'unfit for service' by reason of an unclassified psychosis which had existed prior to his Marine Corps service and had not been aggravated by such service.

"On September 24, 1943, a Marine Corps Retiring Board was convened pursuant to the incorrect and erroneous recommendation of the Board of Medical Survey. On October 25, 1943, the Commandant of the Marine Corps notified plaintiff that as of October 28, 1943, he would be relieved from active duty and be assigned to the Third Reserve District; that upon his discharge from treatment at Saint Elizabeths Hospital, he should proceed to his home in Connecticut. On October 28, 1943, plaintiff was relieved from active duty and his pay and allowances were discontinued. On October 30, 1943, plaintiff was discharged from treatment at Saint Elizabeths Hospital.

". . . . After hearing about the creation by Congress of the Board for the Correction of Naval Records, under section 207 of the Legislative Reorganization Act of 1946 (60 Stat. 837), plaintiff, on December 27, 1947, applied to that Board to correct the errors and injustices resulting from the erroneous and careless medical diagnosis of his physical condition by the Navy, and the consequent erroneous and illegal discharge of plaintiff as unqualified for active service by reason of permanent psychosis. Following diligent efforts by plaintiff and a long investigation and an oral hearing, the Board on March 17, 1948, made findings of fact, conclusions and a decision. The Correction Board concluded that plaintiff had at no time been mentally defective, nor had he ever suffered from any incapacity, physical or mental, which would have prevented him from performing active duty as an officer in the Marine Corps; that the many

diagnoses of insanity rendered by the various medical officers and boards were all completely in error and had been based on numerous false premises, including the mistaken reports from Samoa that plaintiff had imagined two minor injuries prior to his hospitalization for bronchitis in Samoa, and that he had also imagined the encounter with the violent patient in the medical ward in the hospital in Samoa. The Board found that plaintiff's accounts of those incidents, consistently disbelieved by the Naval physicians and officials, had been completely accurate. The Board also found that the Adjutant General of the Army and the Bureau of Medicine and Surgery of the Marine Corps had confused plaintiff's Army records with the Army records of another former Army officer whose name was "Egan"; that on the basis of the Army medical records of the other Egan, Marine Corps officials were convinced that plaintiff had been found insane while serving in the Army and had been discharged from the Army as an insane person prior to his entry into the Marine Corps. In its decision, the Correction Board, after having carefully considered the true facts, concluded that plaintiff had never been insane; that all diagnoses of insanity had been negligently made and in error, that plaintiff had at all times been mentally and physically capable of performing active service as an officer in the Marine Corps; that the discharge in 1944 of plaintiff because of mental incapacity for service was clearly erroneous and should be changed to an honorable discharge without any reference therein to such nonexistent incapacity. The Commandant of the Marine Corps was ordered to cancel the previous illegal discharge and to issue to plaintiff a new honorable discharge in substitution therefor without any reference to physical or mental incapacity, together with a Certificate of Satisfactory Service. The Chief of the Bureau of Medicine and Surgery was directed by the Correction Board to add to plaintiff's medical records a certified copy of the Board's conclusion and decision as the last and final official entry in plaintiff's medical records. The decision of the Board was approved in every respect by the Secretary of the Navy on March 17, 1948.

"Pursuant to the above decision of the Correction Board, the Commandant of the Marine Corps issued orders dated April 7, 1948, cancelling plaintiff's erroneous discharge of April 11, 1944, and substituting therefor an honorable discharge without reference to physical disqualification. . . . The Certificate of Satisfactory Service issued to plaintiff on April 11, 1944, remained in effect."

At the time of his hearing before the Naval Board for Correction of Naval Records in 1948, the plaintiff had been discharged from three positions when his employers discovered he had been confined in a mental institution.[72] Although the plaintiff later sued in the Court of Claims for certain additional benefits,[73] the action taken under Section 207 disclosed the shocking miscarriage of justice set out above and substantially made Egan whole. This case is an excellent example of how Section 207 can be used

[72] *Id.* at p. 382.
[73] See footnote 70, *supra.*

to ascertain the truth and remedy the injustice suffered by an individual.

As noted above,[74] the ABCMR is not under the Army Staff, which situation would militate against any adjustment of grievances, especially those caused by an action of the Army Staff. Indeed, under the Friedman case,[75] any interference by, or consultation with, the Army Staff might occasion court action (and reversal of the action taken under Section 207).

As may be seen from the foregoing, the ABCMR exists solely to ameliorate grievances and offers a forum therefor without cost to the applicant. The presence of such a forum within the Army in which personnel of the Army can have their greivances considered by competent, disinterested officials provides a needed safety valve through which complaints can be dissipated without harm or unfavorable publicity to the Army. Many of such complaints turn out to be justified, and are then remedied; however, even when complaints are not found to be justified, the complainants obtain a measure of relief to the extent that they have had a fair review of their case. No longer can there be legitimate "barracks gripes" about wrongs suffered with no remedy. The existence of the Board precludes this.

[74] See footnote 69, *supra.*
[75] See footnote 68, *supra.*

MISTAKE AS A DEFENSE

By Lt. Colonel Peter C. Manson*

When considered from a purely moralistic point of view, responsibility should be determined not by the actual facts but by the actor's opinion regarding them.[1] In other words, a person should not be found guilty of a crime unless his act was accompanied by the requisite criminal state of mind. It would seem to follow that mistake or ignorance of either fact or law should be a defense if it showed that the accused did not have the requisite criminal intent. When considered in this light, there should be no special rules as to mistake or ignorance of law and fact. They should be treated just as any other evidence in the case, and should become significant only to the extent that they may negate the state of mind required by the particular crime the accused is alleged to have committed. Unfortunately, the law concerned with mistake or ignorance abounds in special rules and complicated reasoning. Distinctions have been made between mistake and ignorance on the one hand, and between the fact and law on the other hand. It is generally stated, for example, that ignorance of the law is not an excuse for a criminal act, whereas ignorance of fact is a defense, provided it was not the result of carelessness or negligence.[2] It will be shown that these general rules are misleading and have created much confusion in the law.

Ignorance or Mistake of Fact

Military law has long followed the general civilian view by providing that ignorance of fact, to be a defense, must be an honest ignorance which is not the result of carelessness or fault.[3] The current Manual for Courts-Martial states the rule as follows:[4]

> "Unless otherwise provided (expressly or by implication) by the law denouncing the offense in question, ignorance or mistake of fact will exempt a person from criminal responsibility if it is an honest ignorance or mistake and not the result of carelessness of fault on his part. . . ."

*JAGC, Military Justice Division, Office of The Judge Advocate General, U. S. Army, Washington, D.C., formerly Chief, Military Justice Division, Academic Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia; member of the Virginia Bar; graduate of the University of Virginia Law School. The views herein expressed are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

[1] Hall, *General Principles of Criminal Law*, 326 (1947).

[2] 15 Am. Jur. *Criminal Law* §306.

[3] Winthrop, *Military Law and Precedents* 291 (2d ed., 1920 reprint).

[4] Par. 154*a*(3), MCM, 1951.

The requirement that the ignorance or mistake be honest has not caused any difficulty. It would appear that the word "honest" is superfluous, meaning only that the ignorance or mistake must be genuine and sincere, as opposed to being feigned. The significant feature of the rule quoted above is that it does not take into consideration the fact that offenses vary in the degree of culpability required, some requiring a specific criminal intent while others require some lesser degree of *mens rea*. Under this Manual rule an accused could be found guilty of an offense not because he had the requisite criminal intent, but because of some carelessness or fault on his part. The Court of Military Appeals first detected this fallacy in the Manual rule in the case of *U.S.* v. *Lampkins*.[5] There, the accused was charged with unlawful possession of marijuana. The law officer followed the Manual rule and instructed the members of the court that if the accused's ignorance of the presence of marijuana in his room was honest *and reasonable*, he could not be found guilty of wrongful possession of marijuana. On appeal, the Court of Military Appeals held that an essential element of the offense was the accused's actual knowledge of his possession of marijuana and, therefore, it was prejudicial for the law officer to instruct the court that conviction could be based upon a careless lack of knowledge.

Although subsequent decisions of the Court conform to the *Lampkins* rationale, the reasoning of the Court is at times misleading and unnecessarily complicated. The Court has attempted to apply the rule of mistake of fact on the basis of whether the offense in question requires a specific criminal intent or a general criminal intent. According to this reasoning, where the offense requires a specific intent the mistake need only be honest, but if the offense requires a general intent the mistake must be honest and reasonable. The Court has stated:

> . . . "To date in our decision [1956], honest ignorance or mistake of fact has been held to constitute a defense in general intent cases only in instances involving the possession or use of habitforming drugs or marijuana, and then the issue has been principally whether knowledge of the presence of the drug was reasonably raised. . . . In all other general intent case we have held that the defense must be predicated on an honest and reasonable mistake."[6]

Following this line of reasoning, the Court held that mistake need only be honest in the offenses of larceny,[7] wrongful posses-

[5] 4 USCMA 31, 15 CMR 31 (1954).
[6] U.S. v. Holder, 7 USCMA 213, 216, 22 CMR 3, 6 (1956).
[7] U.S. v. Rowan, 4 USCMA 430, 16 CMR 4 (1954).

sion or use of narcotics,[8] perjury,[9] and desertion;[10] and it held that the mistake must be honest *and reasonable* in the offenses of negligent homicide,[11] bigamy,[12] wrongfully keeping a disorderly house,[13] and absence without leave.[14] In the words of the Court, "it must be manifest that thus far we have preferred to adopt the principle that to be a defense, in general intent cases, a mistake or ignorance of fact must be both honest and reasonable."[15]

The danger in this reasoning soon became apparent in *U.S. v. Connell.*[16] In that case the accused was charged with dishonorably failing to deposit funds in the bank to cover payment of checks drawn by him.[17] The accused contended he believed he had sufficient funds in his bank account to cover the checks he had written. The law officer, apparently under the impression that the alleged offense was of the general criminal intent type, instructed the court that to be a defense the accused's mistake must have been both honest and reasonable. On appeal, the Court of Military Appeals held that the offense required a state of mind amounting to bad faith or gross indifference and, therefore, it was prejudicial for the law officer to instruct, in effect, that the accused could be convicted if his failure to maintain sufficient funds in his account was the result of simple negligence. It is significant that the Court, in contrast to its earlier decisions, did not state whether the offense charged was of the specific or general intent type. It is equally notable that the Court did not state what kind of mistake *was* the proper standard as to that offense, nor did it refer to any of its previous opinions concerning ignorance or mistake.[18] It is submitted that the Court's holding in the *Connell* case is correct, but its silence

[8] U. S. v. Lampkins, 4 USCMA 31, 15 CMR 31 (1954); U. S. v. Grier, 6 USCMA 218, 19 CMR 344 (1955).

[9] U.S. v. Taylor, 5 USCMA 775, 19 CMR 71 (1955).

[10] U. S. v. Holder, 7 USCMA 213, 22 CMR 3 (1956).

[11] U. S. v. Perruccio, 4 USCMA 28, 15 CMR 28 (1954).

[12] U. S. v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955).

[13] U. S. v. Mardis, 6 USCMA 624, 20 CMR 340 (1956).

[14] U. S. v. Holder, 7 USCMA 213, 22 CMR 3 (1956). A later case in accord is U. S. v. Farris, 9 USCMA 499, 26 CMR 279 (1958).

[15] U. S. v. Holder, 7 USCMA 213, 217, 22 CMR 3, 7 (1956).

[16] 7 USCMA 228, 22 CMR 18 (1956).

[17] This offense is a violation of Article 134, being considered as conduct prejudicial to good order and discipline, or conduct of a nature to bring discredit upon the armed forces.

[18] The Connell opinion did cite U. S. v. Rowan, 4 USCMA 430, 16 CMR 4 (1954), which holds that in larceny the mistake need be honest only, but the case was cited for a different point.

on the aforementioned points reflects the need for reconsideration of the reasoning used by the Court in the earlier cases.

As stated previously, the Court has held that ignorance or mistake of fact must be both honest *and reasonable* to be a defense to the offenses of negligent homicide, bigamy, wrongfully keeping a disorderly house, and unauthorized absence—the rationale being that the offenses required only a general criminal intent.[19] It is to be noted, however, that all of these offenses may be committed merely by simple negligence on the part of the accused. Negligent homicide is defined as the unlawful killing of another by simple negligence, and it is only necessary to prove that the accused, in causing the death, failed to use the care that a reasonably prudent man would have used under the circumstances.[20] Therefore, an honest but *careless or unreasonable* mistake would not be a defense. The offense of bigamy involves sexual immorality and for that reason most jurisdictions hold the accused to a high degree of care. In fact, there are some States which do not allow any kind of mistake, no matter how reasonable, to be a defense.[21] The rule in military law is more lenient in that an accused's belief that he was not married at the time of his bigamous marriage is a defense provided he had taken such steps as would have been taken by a reasonable man, under the circumstances, to determine the validity of that belief.[22] Therefore, his mistake must be reasonable as well as honest. The offense of keeping a disorderly house (house of prostitution), like bigamy, involves sexual immorality and conviction may be based upon proof that the accused *ought* to have known of the activities taking place in his house. Therefore, his claim of lack of knowledge must be on reasonable grounds.[23] The military offense of absence without leave comes close to falling within the category of strict accountability. Proof of the unauthorized absence alone is sufficient to establish a prima facie case.[24] Nevertheless, the Court has indicated that a rea-

[19] See footnotes 11, 12, 13, and 14, *supra*.

[20] U.S. v. Perruccio, 4 USCMA 28, 15 CMR 28 (1954).

[21] *E.g.* Russell v. State, 66 Ark. 185, 49 SW 821 (1899); State v. Hendrickson, 67 Utah 15, 245 Pac. 375 (1926); Rogers v. Commonwealth, 24 Ky. Law Rep. 119, 68 SW 14 (1902); Ellison v. State, 100 Fla. 736, 129 So. 887 (1930); Commonwealth v. Hayden, 163 Mass. 453, 40 NE 846 (1895).

[22] U. S. v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955).

[23] U. S. v. Mardis, 6 USCMA 624, 20 CMR 340 (1956).

[24] Par. 165, MCM, 1951. The Manual appears to limit excuse for an unauthorized absence to instances of actual physical inability to return on time, and cases support this strict view. See *e.g.* CM 350891 (Reh.) Mann, 12 CMR 367 (1953); CM 351941, Cliette, 7 CMR 406 (1952).

sonable belief by the accused that his absence was authorized would be a defense, and has held that the accused's mistake must be both honest and reasonable.[25] In summary, all of the offenses referred to above have the common characteristic of holding an accused to the objective standard of a "reasonable man." He may be convicted if his failure to exercise ordinary care results in death, more than one marriage, lack of knowledge that his home is being used as a house of prostitution, or in an unauthorized absence. Since he is held to the standard of a reasonable man, his ignorance or mistake to be a defense must be both honest and reasonable. However, the important point, and one which is easily overlooked, is that many offenses classified as general criminal intent offenses (for example, unpremeditated murder or assault) require *mens rea* of greater culpability than simple negligence, and it is incorrect to draw from these simple negligence type offenses the broad generalization that "in general intent cases, a mistake or ignorance of fact must be both honest and reasonable."[26] The only rule to be derived from the cases referred to is this: where culpability may be based upon a failure to exercise due care (simple negligence), a mistake or ignorance of fact must be both honest and reasonable in order to be a defense.

Before proceeding to a consideration of other offenses, it should be recalled that the mental element in offenses ranges from a negligent state of mind to a specific intent to accomplish a desired result. Such concepts as specific criminial intent, general criminal intent, *mens rea,* presumed intent, malice, willfulness, scienter, wantonness, recklessness, culpable negligence, and simple negligence have been resorted to in defining "the requisite but elusive mental element" of the various offenses.[27] This "variety, disparity, and confusion"[28] of judicial definitions is compounded when it is attempted to place all offenses in either of the two general classifications of specific criminal intent offenses or general criminal intent offenses. As stated in the case of *Regina* v. *Tolson:*[29]

> "[t]he mental elements of different crimes differ widely. *Mens rea* means in case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman, without her consent; and in the case of receiving stolen goods,

[25] U. S. v. Holder, 7 USCMA 213, 22 CMR 3 (1956).
[26] *Id.* at 217, 22 CMR at 7.
[27] Morissette v. United States, 342 U.S. 246, 252 (1952).
[28] *Ibid.*
[29] 16 Cox C. C. 629, 644, 23 Q.B.D. 168, 185 (1889).

knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name."

Criminal intent, therefore, is that state of mind which a particular law requires the actor to have in order to constitute a particular offense. To determine the necessary state of mind one must look to the legal definition of the particular offense involved. In some cases it is necessary to consider the history of the offense, the legislative intent of a statutory offense, the public interest involved, and the seriousness of the crime as indicated by the authorized punishment.[30]

Keeping this in mind, let us consider the other cases decided by the Court of Military Appeals in the field of ignorance or mistake of fact. The offenses of larceny, perjury, and desertion, all require proof that the accused's acts were accompanied by the intent to bring about certain consequences. In larceny, for example, the wrongful taking of another's property must be accompanied by the intent to deprive the owner permanently of the property. If the accused honestly had the mistaken belief that the property was his own, or that he had permission to take it, he could not possibly have the requisite criminal intent. This mistake or ignorance on his part, no matter how careless or unreasonable, would be a defense. The rule to be derived from these cases, therefore, is simply this: where culpability is based upon a conscious intent or purpose to engage in certain conduct or to accomplish a certain result, an honest ignorance or mistake, no matter how unreasonable, which shows that the accused did not have that intent or purpose is a defense.[31]

There are certain other offenses which are closely allied to the intentional type offenses just mentioned. These offenses do not rquire purposeful conduct, but they require the accused to have actual knowledge that he is engaging in certain conduct or that his conduct will cause certain consequences. The offense of unlawful use or possession of narcotics falls within this category. It must be shown that the accused had actual knowledge, i.e., was aware, of his use or possession.[32] The rule, therefore, is: where culpability is based upon the accused's actual knowledge of certain facts, an honest mistake, no matter how unreasonable,

[30] U. S. v. Doyle, 3 USCMA 585, 14 CMR 3 (1954).
[31] See cases cited in footnotes 7, 9, and 10.
[32] U. S. v. Lampkins, 4 USCMA 31, 15 CMR 31 (1954); U. S. v. Grier, 6 USCMA 218, 19 CMR 344 (1955).

which shows that he did not have actual knowledge of such facts is a defense.

The offenses discussed thus far are grouped at both extremes of the degrees of culpability. On the one extreme are offenses based upon simple negligence, and on the other extreme are those offenses which require specific criminal intent or actual knowledge. Ranged between these extremes are offenses requiring various degrees of culpability. One such offense is illustrated by the previously mentioned case of *U.S.* v. *Connell*.[33] In that case the Court classified the offense of dishonorable failure to maintain sufficient funds in a bank account, in violation of Article 134, UCMJ, as one which required the mental element of bad faith or gross indifference. Proof of a simple negligent failure to maintain sufficient funds does not establish the offense. On the other hand, it is not necessary to prove the accused intended to have insufficient funds or had actual knowledge of the insufficiency of his account. Query, therefore, what kind of mistake should be a defense to this type of crime? If an honest mistake without regard to reasonableness were sufficient, an accused would escape punishment even though he had acted in bad faith and had been grossly indifferent to the status of his bank account. On the other hand, the Court held in the *Connell* case that it was prejudicial to require the mistake to have been reasonable. It is obvious, therefore, that the proper standard lies in between these two degrees of culpability. The rule is this: where culpability is based upon bad faith or gross indifference, an ignorance or mistake of fact must be honest and not the result of gross indifference in order to constitute a defense.[34]

This rule, when viewed together with the three rules previously discussed, reveals the true nature of ignorance or mistake of fact. Rather than a separate rule of law, ignorance or mistake of fact should be regarded as only an evidentiary matter, and it becomes significant only when it is material and relevant to the negation of the required degree of culpability. The overall rule should be: Ignorance or mistake of fact is a defense if it creates a reasonable doubt that the accused had the state of mind required by the offense charged. Consider, for example, the offense of consummated assault. This offense is usually classified as falling within the category of general criminal intent.

[33] 7 USCMA 228, 22 CMR 18 (1956).

[34] This view is expressed in Digester's Note, The Defense of Mistake of Fact, TJAG Chronicle Letter, JAGS 250/56, 14 Sep 56, page 13; and in Appendix XIII, DA Pamphlet, 27–9, *The Law Officer*, 1958.

However, it can be committed only deliberately or through culpable negligence. If an injury is inflicted unintentionally and without culpable negligence, the offense is not committed.[35] Therefore, ignorance or mistake should be a defense so long as it was honest and not the result of culpable negligence. The same type of ignorance or mistake would be a defense to that type of involuntary manslaughter which is based upon culpable negligence.[36]

It is important to appreciate that a single offense may require proof of varying degrees of culpability with respect to the various essential elements of the same offense. For example, to prove a failure to obey an order in violation of Article 92(2), UCMJ, it is necessary to prove *inter alia*, that: (1) the accused knew of the order, and (2) he failed to obey it. Mistake as to (1) need only be honest, because it must be shown that he actually knew of the order.[37] As to (2), the mistake must be honest and reasonable because the failure to obey may be based upon forgetfulness or other cause having its origin in simple negligence.[38] It should also be noted that self-defense presents a special problem. The offense of murder in violation of Article 118(1), UCMJ, requires the specific criminal intent to kill, and a merely honest mistake or ignorance could negative that intent.[39] But a plea of self-defense must be based upon reasonable grounds for fear of death or great bodily harm.[40] Therefore, a mistake as to the grounds for self-defense would have to be honest and reasonable.

Thus far no mention has been made of a possible legal distinction between mistake and ignorance of fact. It is recognized that ignorance implies a complete lack of knowledge. Ignorance is passive, and does not pretend knowledge; mistake presumes to know when it does not.[41] Under this definition it would appear that every mistake involves ignorance, but every ignorance would not necessarily involve mistake. In either event, however, there is a lack of true knowledge, whether the cause is a vacant mind or a mind filled with untrue knowledge. Therefore, notwithstanding this distinction, the legal consequences should be the same whether the lack of true knowledge is the result of ignor-

[35] Par. 207*a*, MCM, 1951.
[36] Par. 198*b*, MCM, 1951; U. S. v. Riggleman, 1 USCMA 336, 3 CMR 70 (1952).
[37] Constructive knowledge is not sufficient. U. S. v. Curtin, 9 USCMA 427, 26 CMR 207 (1958), overruling that portion of par. 171*b*, MCM, 1951.
[38] U. S. v. Pinkston, 6 USCMA 700, 21 CMR 22 (1956); see concurring opinion of Judge Latimer in U. S. v. Jones, 7 USCMA 83, 21 CMR 209 (1956).
[39] Par. 197, MCM, 1951.
[40] Par. 197*c*, MCM, 1951; U. S. v. Ginn, 1 USCMA 453, 4 CMR 45 (1952).
[41] 1 Burdick, *Law of Crime* §183 (1st. ed., 1946).

ance or mistake.[42] Nevertheless, it appears that the Court of Military Appeals believes there is a legal difference between the two terms. In *U.S.* v. *Lampkins*, the Court defined ignorance and mistake and then stated:[43]

> "It should be apparent from the foregoing definition that a mistake based on negligence presents a somewhat different problem than does ignorance based on negligence. We can assume, arguendo, that if a person has knowledge that he possesses an article which may or may not be contraband, he has some duty to determine its characteristics, and, that if he reasonably fails to do so he can be convicted for having it in his possession. The same rationale cannot be applied if he is honestly, albeit negligently, ignorant of its presence. The authorities uniformly hold that a conscious possession must be affirmatively shown, either by direct or circumstantial evidence."

The Court's holding in the case leaves no doubt that honest *ignorance* of possession of narcotics is a good defense, even though the ignorance may result from negligence or unreasonableness. But the Court's view of negligent mistake requires closer scrutiny. It stated, as quoted above, "if a person has knowledge that he possesses an article which may or may not be contraband he has some duty to determine its characteristics, and, that if he reasonably fails to do so he can be convicted for having it in his possession." In other words, to be a defense in such a situation the mistake would have to be reasonable. It is readily seen that the word "knowledge" in the above quotation modifies the phrase "that he possesses an article." It is not absolutely clear, however, that "knowledge" was also intended to refer to the phrase "which may or may not be contraband." Let us first assume that a person has knowledge that he possesses an article, but does not have knowledge that it may or may not be contraband. Here another ambiguity is encountered—that is, the extent of his knowledge of the article. If he only knows he is in possession of a white powder, for example, but has no knowledge of what it actually is, then he *lacks* knowledge of what he possesses. He is *ignorant* of the fact that he possesses talcum, headache powder, powdered sugar, heroin, or whatever the substance may be. Therefore, it seems clear that the situation may be described as an ignorance, rather than a mistake of fact, and, under the *Lampkins* doctrine if his ignorance is honest he has a good defense. Assume, on the other hand, that he honestly thinks the substance

[42] This view is held by Professor Jerome Hall, and he states that there are no important differences as regards legal consequences. Hall, *General Principles of Criminal Law* 324 (1947). Of course, from a practical point of view it may be easier to substantiate a claim of ignorance than mistake.

[43] 4 USCMA 31, 34, 15 CMR 31, 34 (1954).

in his possession is talcum. He is *mistaken* because the powder is heroin, but at the same time he is just as *ignorant* of possession of narcotics as he was when he gave no thought to the identity of the substance he possessed. Therefore, it seems inescapable that a mistake of the type just described, if honest, should have the same legal effect as an honest ignorance, for in the final analysis there is in both instances an *ignorance* of the true identity of the thing possessed. The situation seems to be no different than a knowing possession of a cigarette, accompanied by ignorance that heroin is hidden within the cigarette. It may be safely assumed, therefore, that the Court did not mean that a mistake of this type presents a different problem than ignorance. Let us turn now to the other interpretation, that is, "knowledge" refers not only to possession of an article, but also that the article "may or may not be contraband."

Suppose a person is handed a white powder and is told at the same time that it *may* be heroin. There is no doubt that the Court is correct in stating this presents a different problem. In this situation the person has been made aware of the possibility that he may be in possession of heroin. But it canont be said that such a situation is limited to mistake and does not include ignorance. The person may arrive at an incorrect conclusion and thus be *mistaken* as to the true nature of the substance in his possession. But he may also draw no conclusions as to the identity of the substance and thus be *ignorant* of its true nature. It appears, therefore, that the example now under discussion differs from an honest but negligent ignorance of possession in that the person is *put on notice* that he may have in his possession an article which may be contraband. Since he does not actually know, it is true that he is ignorant, or mistaken, as to the true nature of the substance. But his mistake or ignorance is not honest in the sense of being sincere or genuine. If a person deliberately shuts his eyes to the true facts he should not be permitted to plead ignorance to them.[44] It is concluded, therefore, that there is no legal distinction between ignorance and mistake of fact as a defense.

When mistake or ignorance becomes an issue in a trial, the court must be instructed as to the legal effect of the mistake or ignorance,[45] and any lesesr included offense which may thereby be placed in issue.[46] It is evident from what has been said thus

[44] 1 Burdick, *Law of Crime* §186 (1st ed., 1946).
[45] U. S. v. Grier, 6 USCMA 218, 19 CMR 344 (1955).
[46] U. S. v. Clark, 1 USCMA 201, 2 CMR 107 (1952).

far, that the following reasoning should be applied in determining the proper instruction to be given. First, it must be determined that the ignorance or mistake pertains to an essential element of the offense. Second, the exact *mens rea* or degree of culpability as to that element must be determined. In other words, it must be determined whether the element is one requiring a specific intent (purpose), actual knowledge, merely a simple negligent state of mind, or something in between. Third, in defining the kind of ignorance or mistake that can exculpate, terms must be used which are the converse of the element to which it pertains.[47] For example, if the element of the offense is based upon culpable negligence, the ignorance or mistake must be honest and not the result of culpable negilgence; or, if the offense requires gross indifference, the ignorance or mistake must be honest and not the result of gross indifference. The sample instruction set forth in Appendix XIII of the Law Officer Pamphlet[48] attempts to define ignorance or mistake in this manner, and little difficulty is encountered in the usual case. However, there is always the possibility that the type of ignorance or mistake necessary for a defense may be defined in such a way that it is not the exact converse of the mental element to which it pertains. Furthermore, in some offenses it would be extremely difficult to define the kind of ignorance or mistake which would exculpate and yet not be unnecessarily lenient to the accused. Consider, for example, the difficulty in describing the type of ignorance or mistake which would be a defense to the wanton disregard of human life required in the offense of murder in violation of Article 118(3), UCMJ. This difficulty suggests that it may be better to treat ignorance or mistake as merely an evidentiary matter, rather than a special rule of law. In other words, the court would be told to consider the evidence of ignorance or mistake in determining whether the accused had the requisite criminal intent, but the exact kind of ignorance or mistake sufficient for acquittal would not be defined. Such an instruction could be worded as follows:

> "Your attention is invited to the evidence presented tending to show that the accused thought the grenade he threw into the crowd was defective and would not explode. I have already advised you that you cannot find the accused guilty of the offense charged unless you are convinced beyond a reasonable doubt that the accused evinced a wanton disregard of human life, and I have defined these terms for you. It is for you to

[47] *Cf.* U. S. v. Bull, 3 USCMA 635, 14 CMR 53 (1954).
[48] DA Pamphlet 27-9, *The Law Officer*, 1958.

decide whether the evidence of his mistaken belief, along with the other evidence presented, raises a reasonable doubt as to whether the accused actually evinced wanton disregard of human life."

Ignorance or Mistake of Law

The age old rule, both in civilian and military law, is that ignorance of the law is not an excuse for a criminal act.[49] The rule is said to be founded on the necessities of civil government.[50] It is necessary because it aids enforcement of the law, penalizes ignorance rather than rewarding it, and avoids making the worst classes of society the most privileged. It has often been said in justification of the rule that everyone is presumed to know the law. This legal fiction adds little but confusion. As stated by Lord Mansfield, "It would be very hard on the profession, if the law were so certain, that everyone knew it."[51]

There should be no difficulty in the application of the rule so long as there is no confusion as to what "law" the rule refers. According to Hall, the rule originated in Roman law, and there it referred only to penal laws.[52] If the present rule refers only to penal law, it should be stated as follows: Ignorance of the law which the accused is alleged to have violated is no excuse. Such a limitation is implied by Justice Holmes' statement of the rule:[53] "Ignorance of the law is no excuse for breaking *it*." (emphasis supplied) The following discussion will attempt to show this to be the true meaning of the rule. Certainly there seems to be little doubt as to the validity of the rule when its application is limited to the penal law which the accused is alleged to have violated. Furthermore, when stated in this manner, there are few, if any exceptions to the rule as it is applied in civilian jurisdictions. Reliance upon legal advice by a competent attorney, for example, is no excuse for violating the law;[54] nor is a mistaken belief that the law violated was unconstitutional.[55] Recently, however, a decision of the Supreme Court of the United States indicated the possibility that in certain instances ignorance of the law violated may be a defense. In *Lambert* v. *California*[56] it was held that actual

[49] 15 Am. Jur. *Criminal Law* §305; Winthrop, *Military Law and Precedents* 291 (2d ed., 1920 reprint).
[50] *Ibid.*
[51] See Williams, *Criminal Law* §115 (1953).
[52] Hall, *General Principles of Criminal Law* 343 (1947).
[53] Holmes, *The Common Law* 47 (1881).
[54] *E.g.*, Williamson v. U. S., 207 U.S. 425 (1908); Hunter v. State, 158 Tenn., 63, 12 S.W. 2d 361 (1928).
[55] Reynolds v. United States, 98 U.S. 145 (1878).
[56] 355 U.S. 225 (1957).

knowledge of the duty to register, or proof of the probability of such knowledge, is necessary for conviction of a violation of a municipal code requiring convicted felons living in the city, or visiting the city a specific number of times each month, to register with the city police. Although the court referred to the rule that ignorance of the law is no excuse as being "deep in our law," it emphasized the due process requirement of giving notice "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." The Court, however, stressed its distaste for registration laws of this kind, and it may be that the requirement for knowledge will be limited to such laws.[57]

In the Manual for Courts-Martial the general rule is as follows:[58]

> "As a general rule, ignorance of law, *or of regulations or directives of a general nature having the force of law*, is not an excuse for a criminal act." (emphasis supplied)

Assuming that this statement refers to the law alleged to have been violated, the only real question raised by the statement is what, in the military service, has the force of law? If a certain directive has the force of law, then ignorance of it should not be excused. If the directive does not have the force of law, then obviously ignorance would be an excuse. An analysis of this problem should begin with consideration of Article 92, UCMJ. That article divides orders into two parts, as follows:

> "Any person subject to this code who—
> (1) violates or fails to obey any lawful general order or regulation; or
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; . . . shall be punished as a court-martial may direct."

The wording of the article clearly implies that knowledge is a requirement as to Article 92(2) but it is not a requirement as to Article 92(1). It would appear, therefore, that insofar as the Code is concerned ignorance of a "lawful general order or regulation" would not excuse a violation of it. In discussing Article 92, the Manual defines a general order or regulation as one which is promulgated by the authority of a Secretary of a Department and

---

[57] This view is set forth in 56 Mich. L. Rev. 1008. Also see U. S. v. Juzwiak, 258 F. 2d 844 (2d Cir. 1958), which specifically restricts Lambert to the facts in that case.

[58] Par. 154*a*(4), MCM, 1951.

which applies generally to an armed force, or one promulgated by a commander which applies generally to his command.[59] Under this definition it would appear that the subject matter of the regulation would not affect its status as "law." It is likewise indicated that any commander, regardless of his rank or the size of his command, could promulgate "laws" for his command. However, decisions of the Court of Military Appeals have restricted the broad definition set forth in the Manual. In *U. S.* v. *Brown*,[60] the accused was convicted for violation of an order issued by his company commander (a First Lieutenant) to members of the company directing them to sign a "pass sign-out book" before leaving the company area. On appeal to the Court of Military Appeals, it was held that a company commander did not have the power to issue a general order within the meaning of Article 92(1), and that his orders fall into the category of those orders authorized by Article 92(2), UCMJ, which require proof of actual knowledge. In other words, a company commander's orders do not have the "force of law" and, therefore, ignorance of his orders would be an excuse for violating them. In deciding the case, the Court reviewed the legislative history of Article 92(1), the regulations defining general orders which were in effect when Article 92(1) was passed by Congress, the language of paragraph 171*a* of the Manual, and announced its "doubt that Congress intended to grant to all inferior commanders the same authority to promulgate general orders which had previously been reserved to the Secretary of a Department and to commanders of major commands."[61] The opinion does not define "major commanders" nor does it give any further indication as to what commanders can promulgate "law" to their commands, but it does state that Army Regulations in effect at the time Article 92(1) was passed "provided for use of the term 'general orders' only by a commander having general article to make a detailed analysis of this case. However, the court-martial jurisdiction."[62] It is beyond the purview of this opinion strongly indicates that when the occasion arises the Court will hold that no subordinate commander has the power to promulgate "law" unless his command is held to be a "major command," or, at the very least, he is empowered to exercise general

[59] Par. 171*a*, MCM, 1951.
[60] 8 USCMA 516, 25 CMR 20 (1957).
[61] *Id.* at 519, 25 CMR at 23.
[62] *Ibid.*

court-martial jurisdiction.[63] Such a result will create serious difficulties for the commander who is in command of a relatively large organization or installation and who does not have general court-martial jurisdiction. Posts, camps, and stations are similar to small cities and towns, and the necessity of proving that each violator of a camp "ordinance" had actual knowledge of it would be detrimental to order and discipline. Such a rule would make law enforcement much more difficult and it would reward ignorance rather than penalize it.

In another decision the Court of Military Appeals has held that not all regulations have the force of law, even though promulgated by the authority of a Secretary of a Department and applying generally to an armed force. In *U. S.* v. *Hogsett,*[64] an Army postal clerk was convicted for violating a portion of an Army special regulation, promulgated by the Secretary of the Army, which stated that military postal clerks "must not accept funds for payment of postage with the intention of affixing the stamps to the articles subsequent to acceptance for mailing. Mailers must affix stamps to all matter intended for mailing."[65] It was held that this regulation merely interpreted an advisory provision of the Post Office Department's Postal Manual and that it was in the nature of a guide which was not susceptible of enforcement as a violation of Article 92. The Court said:

> "A regulation which combines advisory instructions with other instructions which contain a specific penalty for noncompliance is not intended as a general order or regulation, within the meaning of Article 92 of the Uniform Code." [66]

Thus, it may be necessary to go beyond the express language of a regulation to determine whether it is intended to have the force of law.

Military law has an unusual feature which cannot be found in any civilian jurisdiction. Even though Article 92(1), UCMJ,

---

[63] In the recent case of U. S. v. Tinker, 10 USCMA 292, 27 CMR 366 (1959), it was held that the Commander, United States Forces, Azores, being in command of a major command and empowered to exercise general court-martial jurisdiction, had the power to issue general orders. In the case U. S. v. Keeler, 10 USCMA 319, 27 CMR 393 (1959) the author judge (Ferguson) stated that an Air Force base commander could not issue a general order under Art. 92(1) because he did not exercise general court-martial jurisdiction. Judge Latimer disagreed with this view, and Chief Judge Qiunn made no comment on this point.

[64] 8 USCMA 681, 25 CMR 185 (1958).

[65] Par. 33, SR 65–15–1, 6 July 1953. The evidence in the case revealed that the accused had an ingenious practice of pocketing the money paid by the mailers and surreptitiously affixing cancelled stamps to the packages.

[66] 8 USCMA 681, 685, 25 CMR 185, 189 (1958).

does not appear to require any proof of knowledge, the Manual divides directives and regulations having the force of law into two categories. In one category there is the flat rule that ignorance of the law is no excuse, but in the other category it must be shown that the accused either knew of the "law" or ought to have known of it. The Manual states:[67]

> "Also, before a person can properly be held responsible for a violation of any regulation or directive of any command inferior to the Department of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard, or inferior to the headquarters of a Territorial, theater, or similar area comand (with respect to personnel stationed or having duties within such area), it must appear that he knew of the regulation or directive, either actually or constructively. Constructive knowledge may be found to have existed when the regulation or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to have known of its existence."

This provision places a burden on these inferior commanders to publish their orders in such a way that they normally would come to the attention of the members of the command. It is important to note that constructive knowledge, as defined in the Manual, is entirely different from actual knowledge or circumstantial evidence of actual knowledge. It is an objective, rather than subjective, standard. The language of the Manual clearly indicates that there is no requirement that the accused actually know of the "laws" promulgated by the inferior commanders referred to above. It is only necessary to show that the commander published his general order or regulation in such a way that the members of his command had the opportunity to know, and *ought* to have known, of it.[68] This requirement can be viewed as a substitute for the formal and regular way in which civilian governments promulgate their laws. It prevents commanders from indulging in the haphazard issuance of numerous and short-lived directives. Ignorance of such a directive *is* excused unless the prosecution can prove beyond a reasonable doubt that the promulgation was such that the accused ought to have known of the directive. Unfortunately, there is an indication that the Court of Military Appeals may not approve of this portion of the Manual. There is *dicta* in *U. S.* v. *Curtin*[69] that "an instruction on constructive knowledge has no place in the court's deliberation upon an Article 92 offense." This case, however, was concerned with a violation of Article 92(2) which clearly requires actual knowledge, and the

[67] Par. 154*a*(4), MCM, 1951.
[68] ACM S–7959, Sanders, 14 CMR 889 (1954).
[69] 9 USCMA 427, 432, 26 CMR 207, 212 (1958).

Court's broad reference to "an Article 92 offense" may have been inadvertent.[70] If the Court decides that actual knowledge is required of orders and regulations issued by commands "inferior to the headquarters of a Territorial, theater, or similar area command", the effect of the decision will be that such directives will not have the force and effect of law. As indicated previously, such a decision would make the governing of the armed forces much more difficult, and it would reward ignorance rather than penalize it.

Another rule, accepted in both civilian and military law, is that where a specific intent is essential to a crime and ignorance of law negatives such intent, such ignorance is a defense. This rule usually is regarded as an exception to the general rule that ignorance of the law is no excuse.[71] The Manual, after providing that ignorance of law is no excuse, adds:[72]

> "However, if a special state of mind on the part of the accused, such as a specific intent, constitutes an essential element of the offense charged, an honest and reasonable mistake of law, including an honest and reasonable mistake as to the legal effect of known facts, may be shown for the purpose of indicating the absence of such a state of mind."

It is submitted that this is not really an exception to the general rule that ignorance of the law is no excuse. Instead, it should be regarded as a separate and distinct rule. It is recalled that the rule previously discussed pertained to ignorance of the law which the accused is charged with having violated, whereas the present rule pertains to ignorance of some law *other* than that which the accused is charged with having violated. Assume, for example, that the accused is charged with larceny, which requires a specific intent to steal. It is quite clear that any ignorance on his part of the law prohibiting stealing would not be a defense. But if he believes the property to be his because of an ignorance or mistake as to the law concerning the ownership of the property, then it is obvious that he had no intent to steal and, therefore, could not be convicted of larceny. When viewed in this light, the rule under

---

[70] It is unfortunate that par. 171*b*, MCM, 1951, erroneously provides that constructive knowledge is sufficient to prove the *actual* knowledge necessary for conviction of a failure to obey orders other than general orders in violation of Art. 92(2), UCMJ. Orders falling within Art. 92(2) do not have "the force of law," and the Code specifically states that the accused must have knowldege of them. It is obvious that in such offenses ignorance of the order would be an excuse. This erroneous extension of the use of constructive knowledge may have the unfortunate result of completely destroying the doctrine.

[71] Perkins, *Criminal Law* 816 (1957); 1 Burdick, *The Law of Crime* §237 (1946); Miller, *Criminal Law* §50 (1934).

[72] Par. 154a(4), MCM, 1951.

discussion closely resembles mistake or ignorance of fact, and it should not be considered as a part of the rule that ignorance of the law violated is no excuse. The Court of Military Appeals, seeing this close resemblance to ignorance or mistake of fact has held that where an offense requires a specific criminal intent, honest ignorance or mistake of law is a defense, without regard to the *reasonableness* of the ignorance or mistake.[73] The Court specifically overruled the portion of the Manual rule, quoted above, that requires the mistake or ignorance of law to be reasonable. In doing so, the Court fully equated the rule of ignorance or mistake of law (other than the law violated) with that of ignorance or mistake of fact insofar as the rule pertains to offenses requiring a specific criminal intent.

It is noted that the Manual rule refers only to those offenses requiring "a special state of mind on the part of the accused." There is no reference to offenses which require other kinds of criminal intent, and the question is raised as to whether the defense of ignorance or mistake of law (other than the law violated) is limited to those offenses which require a specific criminal intent. Assume, for example, that the accused is charged with bigamy and his defense is that he believed his first marriage had terminated prior to his bigamous marriage. If his belief was based upon an honest and reasonable mistake as to the death of his first wife, he has a good defense.[74] But suppose his belief was based upon an honest and reasonable mistake in interpreting the applicable divorce law. Would it not be utterly illogical and unfair to say that in the former instance he had a defense and in the latter instance he had not? Furthermore, the problem is complicated in many instances by the difficulty of determining whether the mistake is of a fact or a law. Although there are no Court of Military Appeals' decisions on this point, it would appear that the fairest and most logical approach would be to put ignorance or mistake of law (other than the law violatel) on exactly the same basis as ignorance or mistake of fact.

Summary

In summary, it is concluded that the present state of the rules of ignorance or mistake is as follows:[75]

---

[73] U. S. v. Sicley, 6 USCMA 402, 20 CMR 118 (1955).

[74] See page 66.

[75] These rules are in general agreement with the proposed statement of the the law contained in the Model Penal Code, Tentative Draft No. 4, ALI (1955).

(1) There is no legal distinction between ignorance and mistake.

(2) An honest ignorance or mistake of fact or law (other than the law violated) is a defense if it negatives the state of mind required to establish a material element of the offense.

(3) The general rule is that ignorance or mistake as to the law violated is no excuse for violating it; however, if the "law" is promulgated by a command inferior to the headquarters of a Territorial, theater, or similar area command, it must appear that the accused had actual or constructive knowledge of it. The extent to which "constructive knowledge" may be applied, and a determination of what commanders can promulgate orders having the force of law, must await further decisions of the Court of Military Appeals.

PUNISHMENT OF THE GUILTY: THE RULES AND SOME OF THE PROBLEMS

By 1st Lt. Richard L. Pemberton*

I. INTRODUCTION

Much of the Army courts-martial process deals with determination of the guilt or innocence of the accused. This study is not concerned with the rules which govern the processes by which guilt is determined. It is not concerned with the social science of penology—the rationalization of punishment. Rather, it deals with the rules of law which determine the types, maximum amounts and combinations of punishments which may be adjudged by courts-martial, and with some of the problems which have arisen with regard to the application of these rules of law. These rules and problems relate the *jurisdiction* of various courts-martial to punish, the *types* of punishments which may be imposed either singly or in combination, the *persons* who may be subjected to such punishments and the *amounts* of punishment which are legal in the case of particular offenses. The subject of consideration is narrow, but its application is very wide, since Army lawyers must grapple with these problems during trial and at all levels of appellate review. The purpose of this article is to set forth a frame of reference within which the punishment rules may be approached, to delineate those areas within which questions are most likely to arise, and, as to those questions, to suggest answers which are not obvious from reading the Uniform Code of Military Justice or the Manual for Courts-Martial.

II. ORIGINS OF AND NATURE OF LIMITATIONS UPON THE POWER OF COURTS-MARTIAL TO ASSESS PUNISHMENTS

A. *Origins of the Power to Assess Punishments*

The power of courts-martial to assess punishments originates in the Constitution of the United States,[1] the Uniform Code of Military Justice,[2] the Manual for Courts-Martial and various Ex-

* Member of faculty, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia; member of Minnesota State Bar; graduate of University of Minnesota Law School.

[1] U.S. Const., art. I, sec. 1; art. I, sec. 8, cl. 14; art. II, sec. 2, cl. 1.

[2] 10 USC § 801-940 (1952 ed., Supp. V) (hereinafter referred to as the UCMJ or as the Code).

ecutive Orders.[3] The Constitution authorizes the Congress "to make Rules for the Government and Regulation of the land and naval forces."[4] Pursuant to this grant of authority the Congress enacted the UCMJ which placed various limitations upon the adjudication of punishments by courts-martial and authorized the President to prescribe further limitations.[5] The President has imposed many such limitations through Executive Orders. These Orders have prescribed the Manual for Courts-Martial and the amendments thereto, making official the many limitations upon punishments which the Manual sets forth.

B. *Nature of Limitations upon the Power to Assess Punishments*

The power of courts-martial to assess punishments may be limited as to the jurisdiction of the particular court to impose the punishment, the type of punishment, the person upon whom it may be imposed and the offense for which it may be imposed. These limitations originate from the same sources as the powers which they affect. The legislative and executive pronouncements often are both a grant of power and a complementary limitation upon that power. For example, the Manual grants a power to impose the punishment of hard labor without confinement, but, at the same time, limits the exercise of that power to cases involving enlisted persons. There is an additional source of limitations upon the imposition of punishments—the case law which has developed with reference to various statutory provisions and executive orders. It is not always possible to consider this case law as no more than a judicial interpretation of an existing legislative or executive limitation. The effect of the interpretation may be to create substantially new legal principles.

These limitations are not mutually exclusive, and in any particular case any combination of them may operate to circumscribe the court-martial's power to adjudge punishments. For example, a summary court-martial could not sentence an officer to undesirable discharge, total forfeitures, confinement at hard labor for nine months and hard labor without confinement for one month for the offense of being drunk in station because: a summary court-martial has no jurisdiction to impose any punishment upon an officer, nor to adjudge a discharge from the service, forfeitures in excess of two-thirds of one month's pay or confinement in ex-

[3] Official orders by the President of the United States to effectuate his constitutional and statutory grants of power.

[4] U.S. Const., art. I, sec. 8, cl. 14.

[5] Arts. 18–20, UCMJ.

cess of one month;[6] undesirable discharge is a type of punishment which is not sanctioned according to custom of the service;[7] an officer is not a person upon whom hard labor without confinement may be imposed as punishment;[8] and the offense of being drunk in station is not an offense for which discharge from the service, forfeiture in excess of two-thirds for one month, or confinement in excess of one month may be imposed.[9] Here limitations of every nature operate to proscribe the punishment sought to be imposed. This interdependence of limitations is the rule rather than the exception and results in complicating a treatment of the subject matter in neat categories. Nevertheless, each of the above mentioned limitations will be discussed in order, except to the extent that analysis of a particular problem requires intermingling them.

III. LIMITATIONS UPON THE POWER OF COURTS-MARTIAL TO ASSESS PUNISHMENTS

A. *Limitations as to the Jurisdiction of Courts-Martial to Adjudge Punishments*

It is axiomatic that a court-martial may not legally punish a person if it has no jurisdiction over that person or no jurisdiction over the offense which he has committed. While jurisdiction as to the person and the offense is a prerequisite to imposition of punishment, it is more properly the subject of a study devoted to the jurisdiction of courts-martial. The third traditional test for jurisdiction of any judicial tribunal is whether it exceeded its powers in the sentence pronounced. The tribunal is without jurisdiction to impose an illegal sentence.[10] Therefore, all questions of maximum legal punishments are questions of jurisdiction in a technical sense. However, for the purposes of this discussion, the term "jurisdictional limitation" will be reserved for those limitations expressly so designated by the UCMJ.

The UCMJ grants to general courts-martial jurisdiction "under such limitations as the President may prescribe, [to] adjudge any punishment not forbidden by [the Code] . . . including the penalty of death when specifically authorized by [the Code] . . . ."[11]

[6] Art. 20, UCMJ.
[7] See NCM 5505513, Calkins, 20 CMR 543 (1956).
[8] Par. 126*k*, MCM, 1951.
[9] Table of Maximum Punishments (hereinafter referred to as the TMP), par. 127*c*, MCM, 1951.
[10] See Grafton v. United States, 206 US 333 (1907).
[11] Art. 18, UCMJ. The Art. 18 grant of jurisdiction to general courts-martial to adjudge in appropriate cases any punishment permitted by the law of war is beyond the ambit of this discussion.

Thus, to determine the jurisdiction of general courts-martial it is necessary to refer to other articles of the Code which proscribe certain punishments, and to the Manual which sets forth the limitations imposed by the President. These proscriptions and limitations are not ordinarily categorized as jurisdictional and they will be discussed under other headings.

Special courts-martial are without jurisdiction to adjudge the punishments of death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, or forfeiture of pay exceeding two-thirds pay per month for six months. They have no jurisdiction to adjudge a bad conduct discharge unless a verbatim record of trial has been made.[12] The jurisdictional limitations upon the punishing power of summary courts-martial are in all cases as severe or more severe than those upon special courts. Summary courts are without jurisdiction to adjudge death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to limits in excess of two months, or forfeiture of more than two-thirds of one month's pay.[13] The Manual makes certain references to types and duration of punishments in the paragraphs which it devotes to jurisdiction.[14] These matters will be discussed *infra.*

B. *Limitations as to the Type of Punishments which Courts-Martial may Adjudge*

1. *General*

Generally, cruel and unusual punishments are forbidden.[15] The Code, Manual and case law have expressly forbidden certain spe-

[12] Article 19 requires that a "complete" record be made. Par. 83*a*, MCM, 1951, has interpreted "complete" to mean "verbatim." This limitation has been approved by the Court of Military Appeals, and failure to transcribe the proceedings verbatim is prejudical error. United States v. Whitman, 3 USCMA 179, 11 CMR 179 (1953). At present no verbatim record is made of Army special and summary courts-martial proceedings and Department of the Army policy prohibits the appointment of reporters for such courts. Par. 1, AR 22–145, 13 Feb. 1957. The other services appoint reporters for their special courts-martial, thus conferring upon them jurisdiction to adjudge bad conduct discharges.

[13] Art. 20, UCMJ. While the Code does not expressly place a jurisdictional limitation of two months upon the punishment of restriction to limits when imposed by general or special courts-martial, the President has limited the period to that length and the effect of the provisions is identical. See par. 126*g*, MCM, 1951.

[14] Pars. 14*b*, 15*b*, 16*b*, MCM, 1951.

[15] U. S. Const. amend. VIII; Art. 55, UCMJ.

cific punishments as cruel and unusual[16] or as contrary to the customs of the service. Some of the less obvious punishments included in the latter category are loss of good conduct time, imposition of additional formal military duties, such as assignment to a guard of honor, and duties requiring the exercise of a high sense of responsibility, such as guard or watch duties.[17] Case decisions have added to this list the imposition of undesirable discharge,[18] and loss of accrued leave.[19] The limitations upon these cruel or unusual punishments are absolute. They are forbidden altogether. Most other forms of punishment are permitted but are limited, according to severity, in application to particular offenses and in determination of appropriate amounts. Generally, we will consider them in their relative descending order of severity, although opinions may differ as to which of several different forms of punishment is actually the most severe.

2. *Death*

The Code sets forth jurisdictional limitations upon the power of courts-martial to impose the death sentence. It may be adjudged only by a general court-martial and then only if specifically authorized by the Code. The death sentence *must* be adjudged if an accused is convicted of spying in violation of Article 106. However, by its terms Article 106 may be violated only by acts committed in time of war.[20] This is the only offense described by the Uniform Code of Military Justice for which the death penalty is mandatory. However, Article 118 provides that either death or life imprisonment *must* be adjudged against an accused

---

[16] Confinement in immediate association with enemy prisoners, Art. 12, UCMJ; flogging, marking of the body or use of irons except for safe custody, Art. 55, UCMJ.

[17] Par. 125, MCM, 1951.

[18] Note 7, *supra.*

[19] JAGN 1951/24, 12 Sep. 1951, 1 Dig Ops, Sent. & Pun., sec. 21.

[20] See also par. 15*a*, MCM, 1951. A considerable body of case law has developed on the question of when a "time of war" is in existence. It is established that a formal declaration of war is not prerequisite to the beginning of a "time of war" nor is a formal declaration of armistice or cessation of hostilities prerequisite to its termination. United States v. Gann, 3 USCMA 12, 11 CMR 12 (1953). A "time of war" may exist in one geographical area but not in another. The test is whether, in fact, the military activity in the area as it relates to the over-all pattern of activity reasonably supports the conclusion that a "time of war" exists there. United States v. Sanders, 7 USCMA 21, 21 CMR 147 (1956). The existence of a time of war is not affected by Executive Orders which suspend the Table of Maximum Punishments or which reinstate it.

convicted of the offenses of premeditated or felony murder. In addition, death always may be imposed upon accused convicted of the offenses of mutiny (Art. 94),[21] misbehavior before the enemy (Art. 99), compelling surrender (Art. 100), forcing a safeguard (Art. 102), aiding the enemy (Art. 104), and rape (Art. 120*a*). Conviction of certain other offenses will support the death sentence when the court-martial deems it appropriate only if the offense was committed in time of war. Included in this category are desertion (Art. 85), willful disobedience of a superior commissioned officer (Art. 90), and misbehavior as a sentinel (Art. 113). Improper use of the countersign (Art. 101) fits into this category in the sense that the death penalty is discretionary, but unlike the others, the act is no offense unless it is committed in time of war. In this respect it is similar to spying.

Even though the Code permits adjudication of the death sentence as to each of the above offenses, the President usually may prescribe limitations as to maximum punishments which will prevent the imposition of the death sentence.[22] However, he has not done so except in a very narrow sense. Consultation of the Table of Maximum Punishments[23] might give the impression that this sort of limitation had been made as to desertion, willful disobedience and misbehavior as a sentinel. These offenses are capital if committed in time of war according to the provisions of the respective Articles. However, the President may limit them so that they must be treated as not capital. This he appears to have done since the maximum punishment in each case is less than death and no exception is made with reference to "time of war." Furthermore, the Manual paragraph which implements these

---

[21] Including attempted mutiny, sedition, or failure to report or suppress the commission of those offenses. Generally, this list is illustrative, not exclusive.

[22] The only situations in which he may not set punishment limits short of death in capital cases are those in which the Code has set a minimum punishment. Spying (Art. 106) is the only offense which involves a mandatory death sentence. In the case of spying the Code, in effect, forbids any punishment other than death if the offense is found to have been committed. Courts-martial have no authority to adjudge punishments forbidden by the Code. Therefore, any limitation would necessarily be ineffectual. Premeditated and felony murder (Art. 118(1) and (4)) convictions require the imposition of a sentence to death or to life imprisonment. Since the Code does not forbid the adjudication of life imprisonment, it would seem that the President here could prescribe life imprisonment as a maximum punishment. Since the Code forbids any lesser punishment a court-martial operating under such a limitation would be without discretion in assessing a sentence if it found an accused guilty of violating one of these subsections of Article 118.

[23] Par. 127*c*, MCM, 1951.

articles and provides that the offenses shall be capital when committed in time of war states: "Although capital under one of the articles cited, an offense is not capital if the applicable maximum limit of punishment prescribed by the President under Article 56 is less than death (127*c*)."[24] Thus paragraph 15 expressly states that the Table of Maximum Punishments limits the court from treating these offenses as capital. However, paragraph 127 almost obliterates this limitation by providing that the Table of Maximum Punishments is automatically suspended as to these offenses and certain others[25] "immediately upon a declaration of war." Since a "time of war" can exist before a "declaration of war" is made, it might be that these offenses could become capital under the purview of the Code Articles and paragraph 15, but still be limited with respect to punishment because there had been no "declaration of war" resulting in suspension of the Table of Maximum Punishments.[26] This possibility is not likely to create much difficulty since a formal declaration of war would normally follow within hours after a "time of war" had begun. If it did not the President would probably suspend the limitation by Executive Order as was done during the Korean Conflict. Beyond this isolated instance there is no situation in which the President has limited the maximum punishment of death when the Code authorizes its imposition.

Even though the above mentioned requirements are satisfied, the sentence of death may not be imposed if a deposition or part of the record from a court of inquiry has been read into evidence on behalf of the prosecution.[27] The reason is that, as a matter of policy, it has been decided that an accused ought not be sentenced to death on the basis of evidence obtained from sources other than testimony in the instant trial. A sentence to death includes by

---

[24] Par. 15, MCM, 1951. Article 56 provides: "The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense."

[25] Offenses for which the Table is automatically suspended are unauthorized absence (Articles 86–87) and malingering (Article 115), *inter alia*. In addition the President by Executive Order has suspended the Table of Maximum Punishments as to disobedience of a superior noncommissioned officer. However, the effect of the suspension was *not* to make these offenses capital since there is no specific statutory authorization to impose the death sentence. Assuming that the offenses were tried by general court-martial, life imprisonment is the maximum permissible sentence.

[26] Ltr, JAGAF, 1953/44, 30 Sep. 1953.

[27] Arts. 49*f*–50; UCMJ, pars. 126*a*, 145*a*, MCM, 1951; United States v. Young, 2 USCMA 470, 9 CMR 100 (1953).

implication a dishonorable discharge,[28] but not forfeiture of pay.[29] Thus, if the court-martial desires that the accused forfeit his pay and allowances it must expressly so sentence him.[30]

There may be some question whether that portion of a sentence requiring forfeiture of all pay and allowances would be effectual when the death sentence is also imposed. The obvious intended effect of such a sentence would be to prevent accrual to the accused of pay and allowances during the months while his case is undergoing appellate review. Assuming that he eventually is executed, his estate would not be enriched by the pay and allowances which had so accrued. If the forfeitures can be applied to all pay and allowances becoming due on or after the date the sentence is approved by the convening authority such a result may be obtained. The Comptroller General has suggested in a dictum that application of forfeitures may occur at this time.[31] However, Article 57*a* of the Code provides that forfeitures may be applied at this time only if they are adjudged "in addition to confinement." There is no express adjudication of confinement in a death sentence case.[32] If confinement has not been adjudged, then Article 57*c* rather than Article 57*a* controls and the forfeitures may not be applied until the date the sentence is ordered executed. It is quite obvious that little would be achieved by such a procedure. It might be argued that any sentence to death should be construed to include also a sentence to confinement which would support the application of forfeitures under Article 57*a* at the time of the convening authority's approval. The difficulty with this argument is that the Court of Military Appeals has stated that changing a sentence to death to a sentence to confinement at hard labor for life constitutes a *commutation* of the sentence, which is a change in form, rather than a *mitigation*, which is a reduction in kind.[33] The inference from this statement is that confinement is not included in a sentence to death.

This problem has been recognized by the drafters of the so-called Omnibus Bill to amend the Uniform Code of Military Justice, and a proposal with reference to it has been included in that bill. It is proposed that there be added to Article 57*a* the follow-

[28] Par. 126*a*, MCM, 1951; United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1953).

[29] JAGJ 1953/2725, 17 Apr. 1953; Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint) 428; *cf.* CM 238138, Brewster, 24 BR 173 (1943).

[30] 33 Comp. Gen. 195 (1953).

[31] *Id.* at 196.

[32] See the suggested form for sentence at App. 13, MCM, 1951.

[33] United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1953).

ing provision: "A sentence to death includes forfeiture of all pay and allowances and dishonorable discharge. The forfeiture may apply to all pay and allowances becoming due on or after the date on which the sentence is approved by the convening authority."[34] Pending enactment of legislation such as this it would seem that no definitive solution to this problem has yet been provided. Advocates faced with it will simply have to argue as forcefully as is possible from the rather indefinite authorities set forth above.

3. *Punitive discharge and dismissal*

Jurisdictional limitations prevent summary courts-martial from adjudging punitive discharge or dismissal.[35] The Code juridictional limitation prevents special courts-martial from adjudging dishonorable discharge or dismissal and, in conjunction with Department of the Army policy, also prevents Army special courts-martial from adjudging bad-conduct discharge.[36] General courts-martial usually may adjudge dishonorable discharge or bad-conduct discharge except when the Table of Maximum Punishments renders them illegal as to a particular offense. Dismissal is appropriate in the case of a commissioned officer and is equivalent to dishonorable discharge,[37] while dishonorable or bad-conduct discharge is appropriate in the case of enlisted personnel.

These three types of discharge are the only recognized forms of punitive discharge and are the only forms of discharge which a court-martial may adjudge.[38] Generally, they may be imposed only by courts-martial. However, there has been at least one notable exception. In 1954, the Secretary of the Army pursuant to orders by the Secretary of Defense *dishonorably discharged* the American prisoners of war who refused repatriation from the Red Chinese. This sort of "administrative dishonorable dis-

---

[34] Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Treasury for the year 1958, at p. 16.

[35] Art. 20, UCMJ.

[36] Note 12, *supra.*

[37] CM 368421, Ballinger, 13 CMR 465 (1953) "A dismissal is more than a separation without honor; it is a separation 'with dishonor' and is *equivalent* to the dishonorable discharge provided as punishment for a warant officer or enlisted person in appropriate cases." Also, sec. 300 of the Act of 22 Jun. 1944 (58 Stat. 286; 38 USC 693*g*) bars all veterans' benefits under any laws administered by the VA based upon the period of service to which a dismissal by reason of the sentence of a GCM pertains.

[38] Undesirable discharge is an administrative discharge and may not be adjudged by courts-martial. See NCM 5505513, Calkins, 20 CMR 543 (1956).

charge" was unprecedented.[39] It was obviously dictated by the exigencies of unusual circumstance, and no attempt has been made to continue the practice.

Only dishonorable discharge is appropriate in the case of warrant officers. The forms of punishment may not be intermixed, although a sentence of an officer to dishonorable discharge will be construed as a sentence to dismissal and will not be declared void.[40] Since the Table of Maximum Punishments applies to enlisted persons only,[41] dismissal legally may be imposed for violation of any article of the Code.[42] However, dismissal may not be adjudged if a part of the record of a court of inquiry has been read into evidence on behalf of the prosecution.[43] Dismissal is the only appropriate means by which a cadet may be punitively separated from the service. The Court of Military Appeals has held that a cadet is "an inchoate officer" whose conduct is measured by the same standards as is an officer's and whose "separation from the service . . . should not be equated with that of an enlisted man."[44]

4. *Solitary confinement*

When the UCMJ was enacted in 1951, it did not expressly forbid courts-martial to impose the punishments of solitary confinement or confinement on bread and water or diminished rations. Army practice had not countenanced this form of punishment for a number of years.[45] Navy practice, on the other hand, had long

---

[39] The Judge Advocate General took the position that a dishonorable discharge could not be adjudged except pursuant to a sentence by general court-martial. The Secretary of the Army nevertheless was ordered to take the action. See Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?*, 41 Cornell L. Q. 545 (1956).

[40] ACM 9073, Gibson, 17 CMR 911, 938 (1954); ACM 7395, Westergren, 14 CMR 560 (1953); *cf.* CM 249921, Maurer, 32 BR 229 (1944). However, a sentence of a warrant officer to bad conduct discharge will not be construed as a sentence to dishonorable discharge since a sentence to bad conduct discharge does not support the inference that court-martial contemplated separation from the service under conditions of dishonor. Such a sentence will be declared void. If the sentence is severable, the portions not affected by the bad-conduct discharge may be affirmed. CM 396001, Morlan, 24 CMR 390 (1957); *accord*, NCM 5900287, Litral, 2 Apr. 1959.

[41] By the express terms of the first sentence of par. 127*a*, MCM, 1951.

[42] Par. 126*d*, MCM, 1951; United States v. Goodwin, 5 USCMA 647, 18 CMR 271 (1955).

[43] Art. 50, UCMJ; see United States v. Sippel, 4 USCMA 50, 15 CMR 50 (1954).

[44] United States v. Ellman, 9 USCMA 549, 26 CMR 329 (1958).

[45] Par. 102, MCM, 1928, and par. 115, MCM, 1949, specifically prohibited it. The 1917 Manual was silent on the subject.

recognized it as permissible.[46] Paragraph 125 of the Manual appears to have been an attempt at recognition and approval of these divergent practices. The paragraph provides that these punishments shall not be adjudged "against Army or Air Force personnel." Immediately thereafter, the paragraph goes on to define the terms involved (Solitary confinement is included within the other two forms of punishment. In this discussion there is nothing to be gained by ascribing different meanings to these terms. They are used interchangeably) and to provide: "Courts-martial shall exercise care and discretion in adjudging sentences of confinement on bread and water or diminished rations. Such sentences shall not be adjudged in excess of 30 days." These latter provisions would logically have to refer to Navy courts-martial and would necessarily support the inference that it was intended by the Manual drafters that those courts should retain their power to impose this form of punishment.

The proscription of the punishment as to Army personnel is unqualified except for a cross-reference to the Manual provision regarding permissible forms of non-judicial punishment. Paragraph 131*b*(3)(*e*) permits confinement on bread and water or diminished rations to be imposed *as non-judicial punishment* for a period not in excess of three days upon enlisted persons embarked in a vessel, excepting noncommissioned or petty officers. There is no indication that this form of non-judicial punishment is reserved to Navy commanders and no apparent reason for granting such a punishing power to Army commanders but not to Army courts-martial. Indeed, logic seemingly dictates the opposite result. This anomaly cannot be attributed to oversight since the Manual provisions are crossreferenced. The provision as to non-judicial punishment is grounded in a specific provision of the Code[47] and perhaps it could be argued that the failure of Congress to make a similar express grant of power to courts-martial was construed by the Manual drafters as an implied denial of the power. However, a search of legislative history reveals no such design on the part of the architects of the Code. During the Senate committee hearings on Article 15 it was apparent that the committee members intended to limit any imposition of the punishmest to enlisted men embarked in a vessel, and for a period not in excess of three days. Although the Senators

[46] Arts. 30, 35, Articles for the Government of the Navy, 34 USC § 1200; § 447, Naval Courts and Boards, 1937. The punishment could be imposed with certain limitations, for periods not in excess of thirty days.

[47] Art. 15a(2)(F), UCMJ.

stated that the punishment should not apply to the Army or Air Force, context indicates that they were not thinking of such personnel when embarked in a vessel.[48]

The first significant judicial interpretation of the Code and Manual provisions is found in *United States* v. *Wappler*.[49] There the Court of Military Appeals recognized all aspects of the problem and concluded by stating:

> "In the interest of clarity, a summary of our views is perhaps required. They are simply these: (1) No court-martial—Navy or otherwise—may adjudge confinement on bread and water for personnel other than those 'attached to or embarked in a vessel,' but (2) a court-martial of any service may impose confinement on bread and water in cases involving personnel—'attached to or embarked in a vessel,' for a 'period not to exceed three consecutive days.' To the extent to which paragraphs 125 and 127*c* of the Manual are in conflict with this construction of the Code, they are without sanction of law and must fall."[50]

Since the accused was a marine rather than a soldier or airman, the Court's statement was dictum as to the power of courts-martial other than those of the Navy to impose such punishment.

There is no question that the Manual reflects current Army policy flatly forbidding courts-martial to impose this form of punishment under any circumstances. There seems to be little question that this Manual provision is a valid limitation upon the court's punishment power under the provision of Article 19 that the President may prescribe such limitations. When the Court said that any provision of paragraph 125 in conflict with its *Wappler* decision must fall, it may have been referring only to the provision permitting Navy courts to adjudge the punishment for periods in excess of three days rather than the provision denying Army courts the power to adjudge it at all. This is logical because the former question was the only one presented to and argued before it and because the Court is not in the habit of denying the President's power to provide a *less* rigorous punishment than that which the Code would otherwise permit. Indeed, by so doing the Court would seem to have violated the Code provision that the President may limit punishments. The *Wappler* dictum resulted from an oblique presentation of the question to the Court at an early period in its existence—a period during which even firm holdings have not been uniformly accepted as precedent. The Court might well refuse to follow that dictum. On the other hand, the Court's language was very clear and cannot be discounted.

---

[48] See Index and Legislative History, UCMJ, SH 326–27.
[49] 2 USCMA 393, 9 CMR 23 (1953).
[50] *Id.* at 396, 9 CMR at 26.

The Court has since come full circle in its point of view and has stated in another dictum that solitary confinement may not be adjudged at all—not by a court-martial of any service. In the case of *United States* v. *Stiles*[51] a marine was sentenced to solitary confinement for one month. The *Wappler* rule would have invalidated all but three days of the sentence to confinement if the accused were embarked in a vessel and would have invalidated the entire sentence if he were not. However, the Court did not rely on *Wappler* and did not state whether or not the accused was embarked in a vessel. It simply stated:

> "To the extent that it directed the manner in which the accused would serve the period of confinement adjudged, the court-martial here exceeded the limits of punishment set by the President. The 'solitary' part of the sentence is illegal."[52]

The Court's reasoning was not clear since the President's prescriptions were relied on by the Government to authorize solitary confinement as well as by the Court to proscribe it. Apparently the Court felt that since the President has set a maximum limit as to confinement in the Table of Maximum Punishments (that is, confinement *at hard labor*) and since *solitary* confinement was more severe than confinement at hard labor, the stricter limitation allowing only confinement at hard labor controls and any attempt to authorize solitary confinement would be ineffectual. The difficulty with this reasoning is that, logically, the *specific* provisions of paragraph 125 would prevail over the general provisions of the Table of Maximum Punishments when the same authority prescribed them both. Also the *Stiles* opinion totally ignored the *Wappler* distinction as to accused embarked in a vessel. Since the instant accused was a marine and since the Court failed to indicate that he was embarked in a vessel, it would appear that he was not. Therefore, according to its strict holding, the *Stiles* case does not overrule *Wappler*. The *Wappler* rule also would not allow the imposition of any solitary confinement upon an accused not embarked in a vessel. However, the language of the *Stiles* case clearly indicates that the Court did not intend to make the distinction upon which the *Wappler* case was based, but instead implied that the total sentence rather than all but three days of it would be invalid even if the accused were embarked in a vessel. It is significant that the Court in *Stiles* did not suggest that the UCMJ forbade the President to authorize imposition of solitary confinement nor the court-martial

[51] 9 USCMA 384, 26 CMR 164 (1958).
[52] *Id.* at 386, 26 CMR at 166.

to adjudge it. Rather it concluded that the presidential limitation of specific punishments for given offenses to confinement *at hard labor*, without mention of *solitary* confinement, constituted a presidential denial to the courts-martial of power to impose solitary confinement. Because of this and because the *Stiles* decision is dictum as to such punishment of accused embarked in a vessel, it is possible that the Court might still uphold the punishment if imposed upon Navy personnel embarked in a vessel. The Code and its legislative history are not inconsistent with such an interpretation. The most specific language on the subject used by the President in the Manual clearly indicates that it was a punishment contemplated as proper as to Navy personnel. Finally, the *Wappler* holding as to Navy personnel (and dictum as to Army and Air Force personnel) clearly sanctions the punishment as to accused embarked in a vessel.

However, the paragraph 125 limitation preventing the adjudication of solitary confinement against Army or Air Force personnel would probably be alleged to control as to those personnel and thus the Court would be confronted with the question whether it was legally proper to apply different rules to the different services. The Court in *Stiles* recognized the problem raised by such a question but its disposition of the case obviated the necessity of deciding it. Assuming the Court concluded that there was not a "sound and justifiable basis for differentiation in punishment between Navy and other Armed Services personnel"[53] either result could still obtain. On the one hand the Court might follow the *Stiles* dictum and deny *any* power to adjudge solitary confinement. On the other hand it might follow the *Wappler* dictum and grant it as to personnel of any service if embarked in a vessel. There is little basis upon which to predict which result will obtain, since that result may be substantially influenced by the facts and procedural posture of the case in which the issue is presented.

5. *Confinement at hard labor*

The UCMJ places no maximum limits upon the imposition of confinement at hard labor other than those in the jurisdictional limits upon inferior courts-martial;[54] one month in the case of summary courts and six months in the case of special courts. The Manual provides that a sentence merely to confinement with-

[53] *Ibid.*
[54] Arts. 19–20, UCMJ.

out hard labor may not be *adjudged.*[55] However, the Court of Military Appeals has stated that this Manual provision only implements Article 58*b* of the Code which provides that omission by the court-martial of the words "hard labor" does not deprive the authority executing the sentence of power to require the accused to perform hard labor while in confinement. Thus, a court-martial legally may sentence an accused merely to confinement and it is error to instruct the court that it must *adjudge* the sentence of confinement *at hard labor.* However, omission of the words is ineffectual to avoid the hard labor.[56] A sentence to life imprisonment pursuant to Article 118(1) or (4) is also construed to mean confinement at hard labor for life.[57] Contrary to the practice in some civilian jurisdictions, a sentence to confinement must be for a definite period of time rather than for "not more than" a given number of years or for a period within maximum and minimum limits.[58]

The President, through the Manual, has placed several conditions upon the imposition of punishment in the form of confinement. Recent Court of Military Appeals decisions with respect to these conditions have caused considerable consternation among those charged with the responsibility of administering military justice. One of these conditions is to the effect that a court-martial may not adjudge a sentence to confinement at hard labor for a period greater than six months unless that sentence also includes dishonorable or bad-conduct discharge. Historically, punitive discharge usually has been attached to sentences to prolonged confinement, and since 1917 there has been a Manual provision requiring such discharge when a sentence to confinement is in excess of a stated period of time.[59]

In *United States* v. *Brasher* the Court of Military Appeals held the present Manual provision operated as an "absolute limitation" against any sentence to confinement in excess of six months in the absence of a punitive discharge and that any such sentence

---

[55] Par. 126*j*, MCM, 1951; *cf.* CM 24356, Bernstein, 27 BR 359 (1943).

[56] United States v. Dunn, 9 USCMA 388, 26 CMR 168 (1958).

[57] ACM 7321, Kinder, 14 CMR 742, 785 (1954).

[58] ACM 7342, Welch, 12 CMR 820 (1953) (A portion of a sentence to "confinement not to exceed five years" is too vague, uncertain, and inadequate to be enforced and is void.); ACM S–3880, Harris, 6 CMR 788 (1952).

[59] Par. 349, MCM, 1917 (requiring dishonorable discharge if confinement exceeded six months); par. 104*b*, MCM, 1928 (requiring dishonorable discharge if confinement exceeded six months); par. 117*b*, MCM, 1949 (requiring either dishonorable discharge or bad conduct discharge if confinement exceeded twelve months); par. 127*b*, MCM, 1951 (the present provision).

was "illegal."[60] Six years later the Court decided *United States* v. *Varnadore* and there expressly overruled its *Brasher* decision.[61] The Court held that the law officer erred to the substantial prejudice of the accused when, in response to a specific question by the president of the court whether the court could adjudge a sentence to confinement for one year without also adjudging a punitive discharge, he read the instant provision of paragraph 127(b). Judge Quinn, speaking for the majority, reasoned that the Code contained no proscription of sentences to prolonged confinement which did not also contain a punitive discharge and that this Manual provision could not be rationalized as an authorized presidential limitation since it was, rather, an extension. That is, it did not limit the court from imposing a punishment permitted by the Code, but rather it required the court to add the punishment of punitive discharge when the Code would have allowed it to impose only the punishment of confinement. Thus, it constituted a policy directive of the Executive which was calculated to influence the court members in their fixing of a punishment less severe than the maximum one the Code permitted them to assess. Therefore, the Manual provision was without sanction of law and must fall. This reasoning was bolstered by an argument from statutory construction. Judge Quinn reasoned that Congress must have contemplated sentences to confinement in excess of one year without a punitive discharge, else it would not have provided for review by a board of review in cases involving punitive discharge *"or"* confinement for one year or more.[62] It would have been superfluous to provide for review of sentences to confinement for one year or more since they would necessarily be coupled with a punitive discharge and be reviewed under the provision for review of all punitive dis-

[60] 2 USCMA 50, 6 CMR 50 (1952). The precise issue was whether a board of review could mitigate the portion of the sentence extending to bad conduct discharge while affirming that portion extending to confinement for ten months. Judge Latimer dissented stating that the limitation of par. 127*b* was binding upon the court-martial but not upon the board of review.

[61] United States v. Varnadore, 9 USCMA 471, 26 CMR 251 (1958). Judge Quinn unequivocally changed his position. Judge Brosman was replaced by Judge Ferguson who took the opposite position. Judge Latimer again dissented (the dissent was without opinion, but cited his dissenting opinion in the companion case of United States v. Holt, 9 USCMA 476, 26 CMR 256 (1958)). The Latimer positions in *Brasher* and *Varnadore* are not necessarily inconsistent since the precise issue in *Varnadore* was not whether the board of review could approve a sentence to confinement in excess of six months while remitting the bad-conduct discharge; but rather, whether a court-martial could adjudge such a sentence.

[62] See Art. 66*b*, UCMJ.

charges. The Court concluded with the following statement in which it seemed to acknowledge the impracticality of its own decision: "True, an accused sentenced to an extended period of confinement is worthless and perhaps even a liability to the services." It was then suggested that such accused could be separated administratively.

Judge Latimer responded to this reasoning through his dissenting opinion in *United States* v. *Holt*.[63] He reasoned that the paragraph 127*b* provision is a true limitation upon the courts' sentencing power since it directs a court which has concluded not to impose a punitive discharge not to impose confinement beyond six months either. He refuted the argument from statutory construction by pointing out that some civilians, prisoners of war and previously discharged military prisoners are subject to the Code and entitled to the appellate safeguards it provides. Since these persons cannot be sentenced to punitive discharge but may be sentenced to confinement in excess of one year, they are entitled to have their cases reviewed by a board of review in that event. The alternative construction of Article 66*b* is for their protection and not to suggest that soldiers may be sentenced to more than six months' confinement without receiving a punitive discharge. Further, Congress had revised the military criminal statute several times since this provision was adopted by the President and had failed to indicate that it considered it to be improper. This might be said to constitute tacit approval.

In the *Holt* case *prejudicial* error was found as a result of the court's exposure to the erroneous Manual provision even though it adjudged a dishonorable discharge, rather than merely a bad-conduct discharge, in addition to confinement for five years. This finding on these facts strongly suggested that the Court was holding that the reading of the Manual provision constituted *general* rather than *specific* prejudice. A rash of irreconcilable board of review opinions appeared attempting to interpret this aspect of the *Varnadore-Holt* holding.[64] In *United States* v. *Horowitz*,[65] the Court held that an instruction prohibiting the im-

[63] See note 61, *supra*.

[64] *Compare* CM 399682, Miller and Kline, 7 Aug. 1958, CM 399943, Insani, 19 Aug. 1958, and NCM 5800996, Sedberry, 5 Aug. 1958 (finding general prejudice), *with* NCM 5800620, Hobbs, 28 Aug. 1958, and NCM 4405025, All, 16 Sep. 1958 (requiring but not finding specific prejudice).

[65] 10 USCMA 120, 27 CMR 194 (1959). It is interesting to note that the sentence in *Horowitz* was *identical* to that in *Holt*. The significant difference would seem to be that the Court in *Horowitz* made no express inquiry as those in *Varnadore* and *Holt* had done.

position of more than six months' confinement without a punitive discharge constitutes reversible error only if specific prejudice is found to have arisen from it.

The *Varnadore-Holt* holding also jeopardized other provisions of the Manual. Paragraph 127*b* also provides that forfeitures in excess of two-thirds pay per month for six months may not be adjudged unless a punitive discharge is also adjudged. After the *Varnadore* decision, boards of review split on the question whether Varnadore applied to forfeitures.[66] Subsequently, the Court commented on such an application in a very equivocal dictum.[67] This dictum compounded the confusion which the conflicting board of review decisions on this point had created. In the *Villa* case, the Court said that the law officer had instructed the court that *"should the accused be sentenced to less than a punitive discharge, you cannot adjudge total forfeitures."* The board of review had held this instruction to constitute prejudicial error under the *Varnadore* decision. Judge Quinn, author of the principal opinion, said:

> ". . . *From one point of view,* the Manual provision may be construed as prescribing a mandatory minimum according to which the court-martial must adjudge a punitive discharge if it desires to impose total forfeitures. So construed, the provision would be contrary to the Uniform Code, in that the President has no authority to establish minimum sentences, as distinguished from maximum sentences. . . . We need not, however, determine whether this is the intention of the Manual. The instruction here conveys an opposite idea. According to its language, the court-martial had *first* to sentence the accused 'to less than a punitive discharge,' before it could consider the extent of the forfeitures. Only then would the *supposed* limitation of the Code come into operation. Unlike the Manual provision, the instruction in no way suggests that if the court-martial decided to impose total forfeitures, it had to include a punitive discharge to give legal effect to its judgment. Nor is there anything in the record of trial which even hints at the fact that the court-martial was considering a sentence of total forfeitures without the imposition of a punitive discharge. See United States v. Horowitz. . . ."[68] (Emphasis supplied in part.)

Judge Quinn said "from one point of view" the Manual provision prescribes a mandatory minimum sentence. This *one* point of view had been *his* point of view. It was not recognized before he set it forth in *Varnadore.* "The opposite idea," which Judge Quinn suggested in *Villa* that the provision conveyed, was the

---

[66] *Compare* NCM 58002200, Thomas, 25 Nov. 1958 (holding that Varnadore-Holt does not apply), *with* NCM 4259022, Cound, 21 Jan. 1959 (holding that Varnadore-Hole applies and permits a sentence to *total* forfeitures for nine months although no punitive discharge is adjudged).

[67] United States v. Villa, 10 USCMA 226, 27 CMR 300 (1959).

[68] *Id.* at 228, 27 CMR at 302.

one which was generally accepted prior to *Varnadore* and indeed was the idea for which Judge Latimer argued in *Holt*. This state of affairs gave rise to conjecture that Judge Quinn had reversed his logic without expressly so indicating. However, the Court has since stated, in *United States* v. *Jobe*,[69] that the *Varnadore* holding did apply to invalidate the provision of paragraph 127*b* requiring a punitive discharge if forfeitures exceed two-thirds pay per month for six months. An instruction in the language of the Manual provision was erroneous. However, the error in the instant case was not prejudicial since there was no reasonable possibility that the court-martial would not have adjudged punitive discharge in addition to the total forfeitures, even had it not been told it must do so.

In *Jobe*, Judge Quinn again authored the principal opinion. He stated by way of dictum that while it was error to instruct the court that it *must* adjudge a punitive discharge if it wished to adjudge total forfeitures; nevertheless, a sentence to total forfeitures for an extended time in the absence of a punitive discharge might be considered cruel and unusual punishment in violation of Article 55 of the Code. Thus, "some cautionary instruction on the imposition of total forfeitures might be legally desirable."[70] The moral of the *Jobe* case would seem to be that error can be created by reading the words of paragraph 127*b* and perhaps also by saying nothing with reference to imposition of total forfeitures. Perhaps the sort of instruction which achieves the golden mean is that given in the *Villa* case which the court approved. There the law officer said: "[S]hould the accused be sentenced to less than a punitive discharge, you cannot adjudge total forfeitures."[71] Some may feel that this is no more than a semantic gyration which is no different from reading the precise words of paragraph 127*b* to the court. The pragmatic argument to the contrary is that the Court approved this instruction while it disapproved the use of the precise words of paragraph 127*b* and suggested that it might also disapprove a failure to instruct at all on maximum forfeitures. This problem appears not to have been laid finally to rest, but use of instruction such as that in the *Villa* case seems to offer as safe a course as any if the goal is to avoid legal error.

Paragraph 126*d* provides that no officer may be sentenced to confinement unless he is also dismissed. The Court has stated

[69] 10 USCMA 276, 27 CMR 350 (1959).
[70] *Id.* at 279, 27 CMR at 353.
[71] United States v. Villa, *supra*, note 55, at 227, 27 CMR at 301.

that *Varnadore-Holt* also applies to invalidate this provision.[72] This holding poses a serious practical problem as to whether an officer who has been in confinement can be of further use to the service. The possibility of administrative separation may be a partial answer. Paragraph 126*a* prevents adjudication of a sentence to life imprisonment unless dishonorable discharge and total forfeitures are also adjudged. It is logically possible that the *Varnadore-Holt* holding may be extended to invalidate this provision. However, it is virtually impossible to conceive of a situation in which a man sentenced to life imprisonment should not be separated from the service with dishonor, though less difficult to conceive of a situation in which a man so sentenced should continue to receive pay.

In *United States* v. *Jones*[73] this issue was presented and the Court expressly declined to decide it, stating: "Even if we were to determine that *Holt* and *Varnadore* compel a finding of error [when this instruction is given] . . . a question we need not decide—we conclude there was no prejudice to the accused."[74] Apparently, the Court was applying a rather unorthodox variation of the harmless error doctrine. That is, rather than commit itself as to whether the instruction was erroneous and then say that although error was present it was harmless, as usually done in application of the harmless error rule, the Court said that even if there was error it was harmless; therefore, it need not determine whether there was error. The *Jones* case stands as the high-water mark as to situations into which it has even been suggested that *Varnadore* might be extended.

Perhaps a brief summary of this body of law will be helpful. The problem as to what is an appropriate instruction with regard to forfeitures looms especially large since on the one hand, reading of the words of paragraph 127*b* has been held to violate the *Varnadore* rule, while on the other hand, failure to warn against imposing total forfeitures for an extended period in the absence of a punitive discharge has been alluded to as constituting instructional error in failing to guard against imposition of cruel and unusual punishment. Perhaps, the previously men-

[72] United States v. Smith, 10 USCMA 152, 27 CMR 227 (1959). But specific prejudice must be shown to secure reversal. Here the erroneous instruction was given and both confinement and dismissal were adjudged but the Court concluded that there was not "reasonable possibility" that the Court was thereby influenced to impose dismissal when it otherwise would not have.

[73] 10 USCMA 122, 27 CMR 196 (1959).

[74] *Id.* at 130, 27 CMR at 204.

tioned instruction which was approved in the *Villa* case strikes as happy a balance as any can. However, it should not be ignored that this sort of verbal gymnastic by which words formerly erroneous, by rearrangement become proper may generate crys of, "Sophistry thy name is law."

The other problems created by *Varnadore* have been resolved in large measure. No one now disputes that it is error to instruct a court-martial that it may not, by a single sentence which does not include a punitive discharge, adjudge confinement in excess of six months. Nor is any variation of this instruction proper. The *Varnadore* rule extends to invalidate the Manual provision requiring dismissal of an officer sentenced to confinement, and may extend to the provision requiring dishonorable discharge of an accused sentenced to life imprisonment. It is at least arguable that it might be extended to invalidate the provision that a fine may be adjudged only when a punitive discharge also has been adjudged, or that the Table of Equivalent Punishments may not be used if a punitive discharge has been adjudged, or that forfeitures may be imposed as an additional punishment only if confinement also is adjudged for a similar period. But there must be a point beyond which the *Varnadore* rule cannot be extended, else one arrives at the ridiculous conclusion that dishonorable discharge cannot be required in a sentence to death case. Those faced with the responsibility of interpreting the *Varnadore* rule will have to make a value judgment as to the extensive effect it should be given and circumscribe it at that point. They will be comforted in the knowledge that in no significant case since *United States* v. *Horowitz* has the Court found error in violating the *Varnadore* rule to be *prejudicial.*

6. *Hard labor without confinement and restriction to limits*

These punishments are the least severe of the punishments involving deprivation of personal liberty, and are similar in that both may be imposed while the sentenced accused performs his normal military duties. The distinction between them is that the man sentenced to hard labor without confinement is restricted to specified areas during his off-duty hours to engage in work details there, while the man sentenced to restriction is merely required to be in the area to which he was restricted. The UCMJ imposes no limits upon these punishments beyond the jurisdictional limit upon the summary court-martial—forty-five days in

the case of restriction.[75] The Manual limits all courts from imposing hard labor without confinement beyond three months[76] and restriction beyond two months.[77] The reason for these limitations would seem to be that experience has shown that it is not reasonable to expect a man who is not under guard to remain in the designated place for longer periods. Since confinement at hard labor and restriction are both forms of deprivation of liberty, the Manual provides that there must be an apportionment when both are adjudged in a single sentence.[78] The time period representing the difference between the period of confinement actually adjudged and the period which legally could have been adjudged may be converted[79] into a period of restriction and adjudged in addition to the confinement. For example, if the maximum period of confinement which could be adjudged for a particular offense were six months, but if the court-martial desired to impose only four, the remaining two months of confinement could be converted into restriction at a ratio of two months of restriction for each month of confinement totalling four. However, the absolute limit on restriction is two months, so only two months' restriction will actually be imposed in addition to the confinement. This rule does not apply to hard labor without confinement and restriction, so a sentence may legally include both of these forms of punishment in a maximum amount. However, they must be served concurrently rather than consecutively.[80]

7. *Fines, forfeitures and detention of pay and allowances*

A fine signifies a pecuniary liability to the United States.[81] It is usually, but not always,[82] adjudged to prevent unjust enrichment. In the case of enlisted persons it may be adjudged

[75] Art. 20, UCMJ.

[76] Par. 126*k*, MCM, 1951.

[77] Par. 126*g*, MCM 1951.

[78] Pars. 16*b*, 127*c*, MCM, 1951.

[79] The conversion is accomplished through use of the Table of Equivalent Punishments, par. 127*c*, MCM, 1951. The ratio is two days of restriction to one day of confinement.

[80] NCM 347, Brooks, 17 CMR 467 (1954).

[81] Par. 126*h*(1), MCM, 1951; *cf.* CM 326853, Anderson, 75 BR 341, 360 (1948).

[82] CM 359204, Galvan, 9 CMR 156 (1953). The case holds that a fine may be imposed upon an officer although there is no unjust enrichment and implies that the same result may occur in the case of enlisted persons; *cf.* United States v. Cuen, 9 USCMA 332, 26 CMR 112 (1958).

only in lieu of forfeitures and not in addition to them,[83] and then only if a punitive discharge has also been adjudged.[84] A fine is considered to be an additional punishment and may be imposed even though the maximum sentence in other forms of punishment has been adjudged. Thus, if an enlisted person is convicted of an offense for which the maximum sentence is confinement for six months and forfeitures of two-thirds pay per month for six months, a sentence to confinement for six months plus a fine (in lieu of forfeitures) in an amount greater than the amount of two-thirds of six months' pay may be imposed legally. Further, the Court may provide for additional confinement, beyond the maximum permitted for the offense, to insure payment of the fine.[85] However, in so doing an inferior court may not exceed the jurisdictional limits as to amount of confinement which Articles 19 and 20 impose.[86] Since the limitation that a fine may be imposed only in lieu of forfeitures expressly refers to enlisted personnel, an officer may be fined even though forfeitures have been adjudged against him also.[87]

Detention of pay is similar to forfeiture with the exception that the pay detained is returned to the accused when he is separated from the service. Generally, the same rules apply as with respect to forfeitures, except that only the pay of enlisted persons may be detained.[88] Paragraph 127*c*, Sec. B, does not expressly provide that a fine may be adjudged only in lieu of detention as it does with regard to forfeitures, so it would appear to be legal to impose upon an enlisted person both detention of pay and a fine. The difficulty with this conjecture is that the apparent reason for the rule is as applicable to detention plus a fine

[83] The Court of Military Appeals has held that forfeitures of pay is not a different form of punishment than a fine. Rather, forfeiture is a less severe degree of the same form of punishment. Thus a reviewing authority may mitigate a sentence to a fine to a sentence to forfeiture of pay. United States v. Cuen, 9 USCMA 332, 26 CMR 112 (1958) (Judge Latimer, dissenting, argued that this holding constituted an illegal commutation of the sentence from one form of punishment to another.)

[84] Par. 127*c*, Section B, MCM, 1951; United States v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956). The *Varnadore* decision might be extended to invalidate the Manual requirement that a punitive discharge be adjudged whenever a fine is imposed.

[85] United States v. Garcia, 5 USCMA 88, 17 CMR 88 (1954); United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953).

[86] Par. 126*h*(3), MCM, 1951; United States v. Garcia, *supra*, note [47] (dictum).

[87] United States v. DeAngelis, *supra*, note [69].

[88] See pars. 126*h*, *126b*, MCM, 1951. Further, pay may not be detained in an amount greater than two-thirds pay per month for three months, rather than six months as in the case of forfeitures.

as to forfeitures plus a fine. That is, since it is anticipated that the fine will be paid from current income and since the forfeiture (or detention) deprives the accused of as much current income as is legally permissible (or fair under the circumstances), it would be improper to expect that he pay a fine out of the remainder. Furthermore, the accused is often in confinement under a sentence which provides for additional confinement until the fine is paid. If his pay has been forfeited or detained, how can he be expected to be able to pay the fine and avoid the extra period of confinement? On the other hand, in the case of detention, the accused will be receiving the pay eventually. Perhaps he could presently arrange to have it allotted toward payment of the fine and thus be deemed to have satisfied the fine for purposes of avoiding extra confinement.

Assuming that detentions of pay generally will be treated similarly to forfeitures, it would seem to follow that allowances may not be detained unless the sentence is "to have all pay *and allowances* detained," and that special and incentive pay is not included in the term "basic pay" when only a partial detention is adjudged.[89]

Computation of maximum partial forfeitures of the pay of enlisted persons can be accomplished through use of the Table of Maximum Forfeitures.[90] Prior to the decision in the *Jobe* case,[91] the maximum permissible forfeiture was two-thirds of the monthly basic pay which reflected accused's cumulative years of service and his present pay grade unless a punitive discharge was adjudged. If a punitive discharge was adjudged, then forfeitures in excess of two-thirds per month or in excess of six months, or both, could be adjudged. Now it would seem that these greater forfeitures may be adjudged whether or not a punitive discharge is adjudged so long as the Table of Maximum Punishments authorizes them and unless they might be construed as cruel and unusual punishment.[92] However, where the Table of Maximum Punishment places the two-thirds permissible limit upon partial forfeitures the rule is the same as before the *Jobe* decision. If the accused is receiving foreign duty pay, this amount is included in determining the amount of pay to which the two-thirds formula is applied, unless he has also been sentenced to

[89] *Cf.* par. 126*h*(2), MCM, 1951.

[90] The Table included in the 1956 Cumulative Pocket Part to the MCM, 1951, is not based on the current pay scale.

[91] Note [69], *supra.*

[92] Note [70], *supra.*

confinement. In that event he is not in a duty status and receives no foreign duty pay. The accused's contribution to Class "F" and "Q" allotments is deducted in arriving at the amount upon which to apply the partial forfeiture formula. However, if he has been sentenced to punitive discharge, these allotments are terminated at the time the forfeiture is applied to his pay and the forfeiture is computed without regard to them.[93]

From 1928 until 20 February 1959 a sentence to confinement, hard labor without confinement or punitive discharge *automatically* reduced an accused to the lowest enlisted pay grade[94] and the maximum partial forfeiture in such a case was computed upon basic pay for that grade as reflected by accused's cumulative years of service. The Court of Military Appeals, in the case of *United States* v. *Simpson*,[95] decided 20 February 1959, held that the Manual provision for automatic reduction in these circumstances was "invalid" because it operated to increase the severity of any sentence by court-martial which did not expressly provide for such a reduction.[96] The Court did not purport to review the President's administrative power to reduce enlisted persons. Rather, it based its holding on its finding that "the provision is so interwoven with the courts-martial process that it cannot be regarded as anything but judicial in purpose and effect." Thus, forfeitures adjudged since 20 February 1959 are computed upon the accused's present grade unless the court-martial expressly reduced him to the lowest enlisted grade or to some intermediate grade. The *Simpson* case created serious problems and is discussed in detail, *infra*, under the section relating to Additional Punishments.[97]

---

[93] Par. 126*h*(2), MCM, 1951; Ltr, JAGN SpCM 5006, 20 Mar. 1952.

[94] In 1896, Winthrop indicated that any sentence of a noncommissioned officer to confinement *should* also embrace reduction. Winthrop, Military Law and Precedents (2d ed. 1920 reprint) 431. Par. 349, MCM, 1917 and 1921, required the court-martial to reduce a non-commissioned officer accused to the lowest enlisted grade if it sentenced him to confinement or to hard labor without confinement but the reduction was not automatic. Par. 103*d*, MCM, 1928 provided: "A sentence in the case of a noncommissioned officer . . . which as ordered executed or as suspended includes either dishonorable discharge . . . or hard labor, whether with or without confinement, *immediately* reduces such noncommissioned officer . . . to the grade of private." The subsequent Manuals have contained substantially similar provisions. See *e.g.*, par. 126*e*, MCM, 1951, as amended by E.O. No. 10652, 10 Jan. 1956, par. 126*e*, Army 1956 Pocket Part, MCM, 1951.

[95] 10 USCMA 229, 27 CMR 303 (1959).

[96] "Once finally announced, the adjudged sentence cannot thereafter be increased by either the court-martial or by a reviewing authority. See United States v. Castner, 3 USCMA 466, 13 CMR 22 [1953]."

[97] See notes 137–155, *infra*.

Sentences to forfeitures should be stated with specificity and in dollars and cents.[98] If they are not, they will be construed in the manner most favorable to the accused.[99] However, a deviation from this requirement must specifically prejudice the accused before the forfeiture will be declared to be without effect.[100]

Beyond the ambit of this discussion are the problems relating to the effective date of sentences to confinement and forfeitures. Generally they are controlled by the actions of the convening authority and are germane to the subject of appellate review.

C. *Limitations as to the Persons upon whom Punishments may be Imposed*

Limitations as to the persons upon whom punishments may be imposed have been discussed previously since these limitations relate to either jurisdiction or type of punishment. In resumé, summary courts-martial have no jurisdiction to try and punish officers under any circumstances nor to punish noncommissioned officers by confinement, hard labor without confinement or reduction, except to the next inferior grade.[101] Commissioned officers may not be punished by punitive discharge, nor may warrant officers or enlisted personnel be dismissed.[102] Solitary confinement probably cannot be adjudged against Army and Air Force personnel.[103] Hard labor without confinement may not be adjudged against officers,[104] nor may detention of pay.[105] Officers may not be punished by a sentence to reduction in grade.[106]

---

[98] JAGJ 1953/6264, 31 Jul 1953.

[99] For example, a sentence to be confined for two months "and to forfeit $30 pay for a like period" results in total forfeiture of $30 and may *not* be interpreted to forfeit $30 of pay per month for two months, or a total of $60. AR 37–104, 2 July 1957, pars. 13–73. Dig. Op. JAG, 1912–40, sec. 402(9). See also NCM 181, Noel, 8 CMR 572 (1953) (sentence to forfeit $50 for six months held to result in forfeiture of only $50 *in toto*, the forfeiture to be spread over the stated period); ACM S–2753, Watson, 5 CMR 476 (1952) ("$60 forfeiture for three (3) months" held to result in forfeiture of $60 for one month).

[100] United States v. Gilgallon, 1 USCMA 263, 2 CMR 170 (1952).

[101] Par. 16, MCM, 1951, par. 6*b*, AR 600-201, 20 June 1956.

[102] See note [40], *supra*.

[103] See notes [45] and [53], *supra*.

[104] See note [8], *supra*.

[105] Par. 126*h*(4), MCM, 1951.

[106] Par. 126*d*, MCM, 1951. This rule is absolute except that in time of war the Department Secretary may commute a sentence of dismissal to reduction to any enlisted grade. Art. 71*b*. UCMJ.

D. *Limitations as to the Amounts of Punishment which may be Imposed for Particular Offenses (The Table of Maximum Punishments)*

1. *General*

Within the framework of the above discussed limitations as to jurisdiction to punish, permissible types of punishments, and persons upon whom certain punishments may be imposed, the President has prescribed specific limitations as to the maximum punishment which may be adjudged against an accused convicted of a particular offense under the Code. These limitations as to the amounts of confinement and forfeitures, and the type of discharge which may be imposed for particular offenses are set forth in the Manual's Table of Maximum Punishments. The TMP, by its terms, applies to enlisted personnel rather than officers.[107] However, paragraph 126*d* of the Manual applies the TMP limits as to confinement to officers also. The primary significance of this distinction in the scope of the TMP is that an officer may be dismissed upon conviction of any offense rather than only those for which the TMP authorizes dishonorable discharge. Also, forfeitures may exceed the TMP limits. However, total forfeitures may not be adjudged against an officer in the absence of a sentence to dismissal[108] unless the *Varnadore-Holt* rule is construed to allow such a practice.[109]

While the punishments listed in the TMP may not be exceeded, they may be varied through use of the Table of Equivalent Punishments.[110] The purpose of the TEP is primarily to provide a procedure by which minor offenders may be returned to a full-duty status while serving their sentences.[111] Its primary use is to convert confinement into forms of punishment, such as hard labor without confinement or restriction, which do not render the accused unavailable for his regularly assigned duties. The Table may not be used to increase the amount of a particular type of punishment beyond the maximum permitted by the Manual limitations other than the TMP relating to jurisdiction and types of punishment.[112] While the primary purpose of the TEP

[107] Par. 127*c*, MCM, 1951.

[108] Par. 126*d*, MCM, 1951.

[109] The *Jobe* case may have so construed it. See notes [69] and [70], *supra*.

[110] Located on a preceding page of par. 127*c* (hereinafter referred to as the TEP).

[111] Legal and Legislative Basis, MCM, 1951, p. 191.

[112] Par. 127 *c*, MCM, 1951. "In making substitutions court must observe the limitations on its jurisdiction *and on particular types of punishment*." (Emphasis supplied.)

is to provide a means to convert confinement into lesser forms of punishment so that the accused may be returned to full-duty status, there is no apparent prohibition against converting lesser forms of punishment into confinement when the court-martial considers such a procedure to be appropriate.[113] The TEP may not be applied to officers or to accused sentenced to punitive discharge. The latter limitation would appear to be based upon the purpose of the Table generally. That is, the purpose of providing an alternative punishment is to restore the accused to a useful duty status earlier than would otherwise be done. If he is to be punitively discharged, it has been concluded that he is of no use to the Army and there is no point in restoring him to full-duty status at an early date. No amounts of punishment or combinations of punishments may be imposed under the TEP if some limitation other than the TMP as to jurisdiction or type of punishment would have prevented their imposition originally.

The limitations of the TMP are controlling except when the President suspends one or another of them. This has been done in time of war and national emergency when it is felt that national security requires the accused be punished more severely than is necessary in normal times. The limitations so suspended relate to offenses against military discipline, security, and full utilization of manpower.[114] Suspension of the President's limitations upon maximum punishments has no effect upon the Congressional limitations found in the UCMJ. Therefore, the punishments adjudged for offenses as to which the TMP has been suspended still must be within the jurisdictional limits placed upon inferior courts. An offense not specifically designated by the Code as capital does not become capital as a result of suspension of the TMP as to it. However, the Code provides that certain offenses are capital if committed in time of war. Usually these offenses will become capital and the TMP will be suspended

[113] Two statements in the Manual support the accuracy of such an interpretation. This sort of conversion is made in the hypothetical example found on pp. 215–216, and the second paragraph of par. 127*c*, Sec. B, states: "If an accused is found guilty of two or more offenses for none of which dishonorable or bad conduct discharge is authorized, the fact that the authorized confinement *without substitution* for such offenses is six months or more will, in addition, authorize bad conduct discharge and forfeiture of all pay and allowances." (Emphasis supplied.) The logical inference from the Manual prohibition of substitution for this purpose is that it is permissible in other situations. However, such a practice does seem to conflict with the purpose of the TEP and is rarely used.

[114] See *e.g.*, E. O. Nos. 10247, 29 May 1951, and 10628, 5 Aug 1955; par. 127*c*, Army 1956 Pocket Paart, MCM, 1951; note 1, p. 217, par. 127*c*, MCM, 1951.

as to them almost simultaneously, although without casual relationship.

2. *Offenses not Listed in the Table of Maximum Punishments*

Maximum punishments are listed by the TMP for offenses under most of the punitive articles of the Code. These maximum punishments also apply to offenses lesser included in the primary offenses for which the punishments are expressly prescribed and to offenses closely related to those primary offenses. Occasionally, an accused may be convicted of an offense for which no maximum punishment is expressly prescribed but which is lesser included in one offense and closely related to another offense, for both of which maximum punishments are expressly prescribed. The situation is most likely to arise under the general article, Article 134. In such a case it is the lesser of the two maximums which limits the punishment which may be adjudged.[115]

In other instances an offense under Article 134 may be neither lesser included in nor closely related to any of the listed offenses. In this situation the maximum legal punishment is the same as that prescribed for similar civilian offenses under the United States Code or the Code for the District of Columbia, whichever is lesser.[116] Questions of degree are certain to arise in applying these rules. It is almost inevitable that some offenses not listed will be related to several others which are listed and which provide widely varying maximum punishments. If this is the case, a value judgment must be made whether the non-listed offense is as closely related to one as to the other. If so, the lesser of the maximum punishments controls. If not, the maximum for

[115] Par. 127*c*, MCM, 1951; *e.g.*, United States v. Beach, 2 USCMA 172, 7 CMR 48 (1953). The offense of failure to deliver mail is lesser included in the offense of "obstructing the mail" (DD, TF, CHL 5 years) and is closely related to "being derelict in the performance of duties" (PF, CHL three months). The lesser punishment is the legal maximum.

[116] Par. 127*c*, MCM, 1951; *e.g.*, CM 363644, Butler, 11 CMR 445 (1953) (the law officer instructed that the maximum punishment for operating a house of prostitution was DD, TF, and CHL for 5 years, probably reasoning that the offense was closely related to that of pandering (Art. 134) for which such punishment is prescribed. The board held that the TMP lists no offense in which the instant one is lesser included or to which it is closely related, nor does the USC. However, the District of Columbia Code, Sec. 22–2722, provides the maximum punishment of a $500 fine and imprisonment for one year for the offense of keeping a bawdy house. Since there is no allegation of unjust enrichment, the maximum permissible punishment in the case is DD, TF, and CHL for one year); United States v. Long, 2 USCMA 60, 6 CMR 60 (1952) (the offense of assault upon a witness is not lesser included in or closely related to any offense listed in the TMP, but it is closely related to the offense of obstructing justice in violation of 18 USC §1503 and is punishable as the USC provides for that offense).

the one to which the instant offense is *more* closely related controls.[117] Similarly, a value judgment must be made as to whether the instant offense is "closely" related to *any* offense listed in the TMP or whether it is necessary to resort to the United States Code or to the District of Columbia Code to fix the maximum punishment. Here, however, the question is *not* whether the instant offense is more closely related to one than to the other, as was the case in determining which of two closely related listed offenses controlled. Rather, if it is decided that the instant offense is closely related to any listed offense, the maximum punishment for the listed offense controls even though there is a much closer relationship between the instant offense and the one set forth in the civilian statute.[118] This principle apparently extends to the point that the TMP maximum punishment would control, although it were more severe, even when the offense is charged under Article 134 as a "crime not capital" and in the precise language of the federal civilian statute which describes the crime.

3. *"Footnote 5" to the Table of Maximum Punishments*

The TMP prescribes the maximum legal punishments for failing to obey any lawful general order or regulation and for knowingly failing to obey any other lawful order. They are, respectively: dishonorable discharge, total forfeitures and confinement at hard labor for two years; and bad-conduct discharge, total forfeitures and confinement at hard labor for six months; both rather severe punishments. Footnote 5 to the TMP qualifies these maximum punishments by providing that the punishments

[117] United States v. Alexander, 3 USCMA 346, 12 CMR 102 (1953) (accused was convicted of the offense of accepting money to transport a prostitute in a government vehicle (Art. 134), an offense not listed in the TMP. The instant offense is closely related to a simple disorder under Art. 134 (PF 4 months, CHL 4 months) but it is *more* closely related to the offense of graft under Art. 134 (DD, TF, CHL 3 years), and the greater maximum punishment controls).

[118] United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953) (the offense of "fraudulent conversion" of funds entrusted to one who is a disbursing officer is expressly proscribed by 18 USC 653, but since it is closely related to the listed offense of larceny (AW 93), the maximum punishment for the listed offense controls); NCM 5602679, Cramer, 20 Nov 1956 (Accused was convicted of the offense of disrespect to the national ensign (Art. 134). The offense is not listed in the TMP nor is it lesser included in a listed offense. It is not mentioned in the U. S. Code, but the exact offense is proscribed by Ch. 34, Sec. 22–244, of the District of Columbia Code ($100 fine and 30 days' imprisonment). However, the acts of accused "are deemed to be clearly 'closely related' to disloyalty [Art. 134, DD, TF, CHL 3 years] if not actually disloyal in themselves". Therefore the TMP limitations controls.).

for these offenses do not apply in cases where the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in the Table. During the early period of the administration of military justice under the UCMJ, this provision was applied, without apparent difficulty to such offenses as failure to report as ordered to perform extra duty, as in the case of *United States* v. *Wiley*,[119] or appearing not in the prescribed uniform, as in the case of *United States* v. *Carpenter*.[120] Although these acts of omission were charged under Article 92 it was held that the maximum imposable punishments were controlled by the TMP limitations upon punishments for violation of Articles 86(1) and 134—the mild punishments of partial forfeitures and confinement, each not to exceed one month.

Later, in the case of *United States* v. *Buckmiller*,[121] the Court of Military Appeals was confronted with a fact situation quite similar to that in the Wiley case. It held that failure to report for duty as ordered constituted a violation of Article 92, Footnote 5, to the contrary notwithstanding.

Judge Quinn speaking for the Court, said:

"The language of the footnote, even as amplified in the discussion of the drafters of the Manual, is exceedingly ambiguous. A technical and entirely literal interpretation of the footnote leads to a conclusion that in no case can an accused be convicted of knowingly failing to obey a lawful order under Article 92, supra, if the circumstances of the offense also involve, in any way, 'failure to go to . . . the appointed place of duty' under Article 86. This, we think, cannot have been the result intended. The footnote becomes much more sensible if interpreted to require a comparison of the gravamen of the offense set out in the specification with the charge it is laid under and other articles under which it might have been laid.

". . . We have no doubt that the facts alleged in the specification would support a charge under Articles 86(1). That, however, is not the test. The gravemen of the offense as spelled out in the specification is the disrespect for authority as evidenced by the disobedience of the direct order of a superior. This is obviously an offense of a more serious character than that condemned by Article 86(1). The latter article contemplates, generally, a failure to report for routine duties as prescribed by routine orders. . . .

". . . .

"Where a member of the Armed Forces is given a direct, personal order by a superior to report to a particular place, and this order is disobeyed,

[119] SpCM 3746, Wiley, 1 CMR 420 (1951).
[120] CM 344936, Carpenter, 11 BR–JC 369 (1951).
[121] 1 USCMA 504, 4 CMR 96 (1952).

Article 92, supra, is violated." (1 USCMA at 505–506, 4 CMR at 97–98.)

Judge Quinn expressly approved the *Wiley* and *Carpenter* holdings, confined to their facts.

The Court has continued to find Footnote 5 to be inapplicable in some of the cases presented to it. In so doing it has commented:

"... [T]he controlling element to be looked for in determining the punishment to be assessed is whether the failure to obey a direct personal order of a superior to perform some duty [was involved] rather than failure to perform such duty ordinarily considered routine. If there is found to be a failure which indicates disrespect for authority by the flaunting of a direct order of a superior, the footnote is inapplicable and the greater punishment may be imposed."[122]

In his concurring opinion to a decision in accord with the *Buckmiller* holding,[123] Judge Brosman observed:

"I am not too greatly concerned that in the Buckmiller case we referred in passing to United States v. Carpenter, 11 BR–JC 369—a case similar to the present one—as reflecting a proper application of Footnote 5, whereas here we appear to reach a contrary conclusion. The Carpenter case was decided in 1950. Perhaps the gravamen of an offense may change with circumstances. Perhaps the two cases may be distinguished. Or perhaps the majority in Buckmiller simply chose in dicta a bad illustration." (3 USCMA at 501, 13 CMR at 57.)

On the other hand, the Court has used the "comparison of the gravamen" test to find that Footnote 5 *is* applicable.[124] Thus it would seem that cases involving the issue of the applicability of Footnote 5 will be decided on an *ad hoc* basis. Counsel can do little more than argue as persuasively as possible that the case under consideration is more similar on its facts to those in the favorable line of authority than to those in the contrary line.

4. *Permissible Additional Punishments*

a. *Permissible Additional Punishments Based upon Prior Convictions*

First, it should be noted that it is only the TMP limitations which may be exceeded in imposing *any* of the additional punishments. Jurisdictional limits and limits as to types of punishment may not be exceeded. For example, an Army special court-martial cannot adjudge a bad-conduct discharge as an ad-

[122] United States v. Larney, 2 USCMA 563 at 568–69, 10 CMR at 66–67 (1953).

[123] United States v. Yunque-Burgos, 3 USCMA 498, 13 CMR 54 (1953).

[124] United States v. Loos, 4 USCMA 478, 16 CMR 52 (1954).

ditional punishment because it has no jurisdiction to do so.[125]

After an accused is found guilty, the prosecution is permitted to introduce evidence of the accused's previous convictions by courts-martial. In order to be admissible, the evidence must relate to offenses committed during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted.[126] In other words, a previous conviction is admissible if the prior offense for which convicted occurred during current service and within three years of any offense of which the accused stands convicted in the present trial.[127] The general purpose of evidence of previous convictions is merely that the court should consider this information in determining an appropriate sentence. Under certain circumstances, however, once such previous convictions have been admitted into evidence they may operate to increase the maximum authorized punishment.

Section B of the TMP provides that if the maximum punishment for the offense of which the accused is convicted does not extend to punitive discharge, proof (admissible under the aforementioned rules of general admissibility) of *two* previous convictions of offenses will authorize bad-conduct discharge, total forfeitures for any period of confinement, and confinement at hard labor for three months.[128] Executive Order No. 10565, amending Section B, provides that if the maximum punishment for the offense of which the accused is convicted does not extend to dishonorable discharge, proof (admissible under the aforementioned rules of general admissibility) of *three* previous convictions during the year next preceding the commission of the instant offense will authorize dishonorable discharge, total forfeitures and confinement at hard labor for one year.[129]

The previous convictions upon which imposition of these additional punishments is based must have occurred prior to the *commission of* one or more of the offenses of which the accused

[125] See note [13], *supra*.

[126] Par. 75*b*(2), MCM, 1951.

[127] United States v. Crusoe, 3 USCMA 793, 14 CMR 211 (1954). Rules of admissibility are discussed in greater detail in the instructional material pertaining to Trial Procedure.

[128] Par. 127*c*, Sec. B, MCM, 1951, as qualified by par. 75*b*(2), MCM, 1951.

[129] E.O. No. 10565, 28 Sep. 1954, par. 127*c*, Army Pocket Part, MCM, 1951, as qualified by par. 75*b*(2), MCM, 1951.

stands convicted at the instant trial, not merely prior to the trial. This rule is obvious in the case of Executive Order 10565 from reading the plain words of Order.[130] While Section B makes no similar express requirement that the previous convictions occur prior to commission of the instant offense, an Air Force board of review has so held.[131] This interpretation seems most logical and proper since whatever deterrent effect the prior conviction effects should be in operation at the time the accused *does* the subsequent wrong, not merely at the time he is punished for it.

It has been suggested by a Navy board of review in the *Brown* case[132] that the provision of Executive Order No. 10565 that the *convictions* must have occurred within the year next preceding the commission of the instant offense be interpreted to require that the *underlying offenses* as well as the convictions thereof must have occurred within that one year. The board reasoned that the date of commisison of the offense is the determinative date rather than the date of the conviction because the increase in punishment is authorized as a result of a failure of an accused to maintain a satisfactory course of conduct during the preceding year. A dissenting opinion was filed which stated that the plain words of the Order should be accepted and that the underlying offenses might be committed more than one year prior to the instant trial so long as the convictions occurred within the preceding year.

The dissenting view was in accordance with the plain words of the Executive Order, and is the more logical view when considered in the light of the apparent purpose of the additional punishment provisions. The theory is that certain tendencies

[130] The Order states: "[P]roof of three or more previous convictions during the year next preceding the *commission* of any offense of which the accused stands convicted will authorize [additional punishment]. . . ." (Emphasis supplied.) Note [111], *supra*. See also CM 383134, Eckert, 19 CMR 434 (1955).

[131] ACM S–6725, Henson, 11 CMR 832 (1953). The Air Force has taken the position that the commissions and convictions of the various offenses must proceed in perfect chronological order. Thus, there must be a conviction of the first of the previous offenses before the second is committed even though the third offense occurs long after the prior convictions. ACM S–2859, O'Shana, 6 CMR 816 (1952). The apparent rationale is that the accused was not properly deterred by a first conviction when he committed the second offense. This construction does not seem sound since the administrators of military justice are concerned only with the deterrent effect which existed when the instant offense was committed. Provided that all the previous convictions are final, the order in which the underlying offenses were committed does not seem significant.

[132] SF NCM 5601078, Brown, 5 Nov. 1956.

toward incorrigibility are manifested when a man commits an offense even though he has been convicted previously of two or three other offenses and has, supposedly, been subjected to penal measures designed to strike at the source of his motivation to commit criminal acts and to impress him with the error of his ways and the need for better conduct. These penal measures are thought to have the effect of deterring him from committing another crime. If he does commit another crime in the face of these deterring factors, the more severe punishment, including punitive discharge, is considered to be warranted. Under this rationale, it is the prior *convictions* which are important, not merely prior criminal acts. Thus, it would seem that the *Brown* case does not announce a sound principle. Apparently it has not been followed. While the Court of Military Appeals has not decided the question, dictum from an Army board of review decision indicates that conviction rather than commission of the prior crime is the significant event in applying the additional punishments provisions.[133]

The various additional punishments which paragraph 127(c), Section B, authorizes upon proof of two prior convictions are severable, except that forfeitures may not be imposed as an additional punishment in the absence of a sentence to additional punishment of confinement for an equal period.[134]

b. *Additional Punishments Appropriate in the Absence of Prior Convictions*

Although additional punishments are usually considered in association with prior convictions, some forms of punishment may be imposed in addition to the TMP maximum without reference to accused's prior convictions. Thus, if an accused is found guilty of *two or more* offenses for none of which dishonorable or bad-conduct discharge is authorized, the fact that the authorized confinement (without substitution via the TEP) for the offense is six months or more will, in addition, authorize bad-conduct discharge and total forfeitures.[135] Also a fine may be

[133] CM 383134, Eckert, 19 CMR 434 (1955).

[134] United States v. Watkins, 2 USCMA 287, 8 CMR 87 (1953) (stating confinement, *immediately* reduces such noncommissioned officer . . . to the grade of private." Subsequent Manuals have contained similar provisions.

[143] Par. 126*e*, as amended, expressly authorizes the Service Secretaries to included with the discussion of punishments which may be imposed by prosess that it cannot be regarded as anything but judicial in purpose and

[149] *Id.* at 232, 27 CMR at 306.

[150] *Id.* at 236, 27 CMR at 310.

adjudged in addition to the stated maximum punishments for an offense, subject to the limitations discussed at notes 81 to 87, *supra*. Reprimand or admonition may be adjudged as additional punishment in any case.[136]

For many years reduction in grade has been an appropriate additional punishment to impose upon an enlisted accused in addition to the maximum punishments otherwise authorized for violation of any of the punitive articles of the Code.[137] Not only has reduction in grade been permissible, but until recently it was required in certain instances. The 1951 Manual provides that reduction to the lowest enlisted grade is *automatic* if the accused is sentenced to punitive discharge, confinement or hard labor without confinement,[138] even though the court-martial did not adjudge reduction. This Manual provision is the culmination of a trend which began over half a century ago. In 1896 Winthrop indicated that any sentence of a noncommissioned officer to confinement *should* also embrace reduction.[139] Under the 1917 and 1921 Manuals for Courts-Martial, reduction was not automatic but the court was required to reduce a noncommissioned officer accused to the lowest enlisted grade if it sentenced him to confinement or to hard labor without confinement.[140] Beginning in 1928 in the case of a sentence to dishonorable discharge, confinement at hard labor, or hard labor without confinement, reduction to the lowest enlisted grade was automatic, whether or not the court adjudged it.[141]

The automatic reduction provision of the 1951 Manual was impliedly approved by the Court of Military Appeals in the case of *United States* v. *Flood*.[142] In the *Flood* case the court-martial sentenced the accused to confinement for nine months but to reduction only to an intermediate enlisted grade. This sentence conflicted with Navy Policy requiring that the court adjudge reduction to the lowest enlisted grade when confinement exceeds three

[136] *Ibid.*

[137] *Ibid.*

[138] Par. 126*e*, MCM, 1951, as amended by E.O. No. 10652, 10 Jan 1956; see par. 126*e*, Army 1956 Pocket Part, MCM, 1951.

[139] Winthrop, Military Law and Precedents (2d ed. 1920 reprint) 431.

[140] Par. 349, MCM, 1917 and 1921.

[141] Par. 103*d*, MCM, 1928, provided: "A sentence in the case of a noncommissioned officer . . . which as ordered executed or as suspended includes either dishonorable discharge . . . or hard labor, whether with or without confinement, *immediately* reduces such noncommissioned officer to the grade of private." Subsequent Manuals have contained similar provisions.

[142] 2 USCMA 114, 6 CMR 114 (1952).

months.[143] The board of review had taken "corrective action" by declaring that portion of the sentence extending to intermediate reduction to be a nullity, since it conflicted with the confinement portion of the sentence, and by affirming that portion extending to confinement. The accused argued to the Court that the board's disposition would result in his reduction, in effectuation of the Navy policy, to the lowest enlisted grade by the authority which executed the sentence. Thus, his sentence would have been increased illegally. The Court agreed and held that it was the portion of the sentence extending to confinement in excess of three months which should be nullified so as to give effect to the intermediate reduction and make the entire sentence consistent with its least severe part. In so doing the Court assumed the validity of the automatic reduction provision of paragraph 126*e* and the Navy provision based upon it. If the Court had considered the Navy reduction provision, which depended for its validity upon the validity of the automatic reduction provision in the Manual, to be invalid it could have affirmed the sentence to confinement in excess of three months which the court adjudged. Such a sentence would not then have resulted in reduction to the lowest enlisted grade.

Six years later, in 1958, the Court again considered the Navy practice which was based upon paragraph 126*e*. It held that the Navy policy of requiring reduction to the lowest enlisted grade when the sentence to confinement exceeded three months could not be called to the Court's attention through an instruction.[144] This holding did not expressly invalidate paragraph 126*e* but it forecast such a result in the event the issue was squarely presented. Judge Quinn speaking for the majority, said:

> "We need not at this time . . . determine whether the provision [of par. 126*e*] is a proper exercise of the President's power to fix the maximum limits of punishment."[145]

Thus the Court had recognized the issue as to the propriety of the automatic reduction provision and the stage was set for a

[143] Par. 126*e*, as amended, expressly authorizes the Service Secretaries to prescribe rules in lieu of the automatic reduction provision. Pursuant to this provision, Navy procedure has differed from Army procedure in this matter in that reduction to the lowest enlisted grade was not automatic but was required to be adjudged by the court when the accused was sentenced to confinement in excess of three months. See par. 0109, Naval Supplement, MCM, 1951.

[144] United States v. Choate, 9 USCMA 680, 26 CMR 460 (1958).

[145] *Id.* at 682, 26 CMR at 462.

decision on that issue. In this context the case of *United States* v. *Simpson*[146] was decided.

The *Simpson* case arose in the Air Force which also had a slightly different procedure from that of the Army. In the Air Force, when the sentence adjudged would result in automatic reduction, the convening authority was allowed to retain the accused in grade or reduce him only to an intermediate grade if he so chose. This could be done only if he suspended that portion of the sentence which would otherwise invoke automatic reduction.[147] In *Simpson* the court-martial sentenced the accused to bad-conduct discharge and did not mention reduction; thus, automatic reduction to the lowest enlisted grade would have followed. However, the convening authority invoked the Air Force policy mentioned above and reduced the accused only to an intermediate grade unless the suspension was vacated, "in which event, the accused, at that time, will be reduced to the lowest enlisted grade without further action."[148] The issue presented to the Court for decision was whether the convening authority's action imposing intermediate reduction as an alternative to automatic reduction was erroneous in that it constituted an illegal increase in the court-martial sentence which had not adjudged reduction. The Court held that it was erroneous, stating:

> "We do not desire, nor are we required, to examine the President's administrative power to reduce enlisted persons in the armed forces. Our only concern is with judicial acts in the course of court-martial proceedings. . . .
>
> "As we construe the Manual provision, it is intended to be an integral part of the review of a sentence adjudged by a court-martial. Executive Order 10214, February 8, 1951, 16 F.R. 1303, which prescribes the Manual, specifically says that it applies 'to all court-martial processes.' Manual for Courts-Martial, supra, page IX. The reduction provision itself is included with the discussion of punishments which may be imposed by courts-martial. The provision is so interwoven with the courts-martial process that it cannot be regarded as anything but judicial in purpose and effect. As a judicial act, it operates improperly to increase the severity of the sentence of the court-martial. We conclude, therefore, that the provision is invalid. Accordingly, the action by the convening authority reducing the accused in grade must be set aside."[149]

Judge Latimer dissenting in part, quoted extensive civilian and military authority sanctioning the power of the President to prescribe regulations of the same force and effect as law. Then he stated:

---

[146] 10 USCMA 229, 27 CMR 303 (1959).
[147] See Air Force Regulations 111–115, 18 Mar 1957.
[148] 10 USCMA at 231, 27 CMR at 305.
[149] *Id.* at 236, 27 CMR at 310.

"Only in those instances where a Secretary of a service has made the reduction nonautomatic and required that it be included in a sentence is it of any concern of the court-martial and if granting an additional right to an accused, such as permitting reviewing authorities the power to bar a reduction as a matter of clemency, is a judicial act—which I do not concede—then, I say the Secretary can legally perform judicial functions. But by any stretch of the imagination this particular provision does no more than make the rank held by an enlisted person in the armed service depend upon the final outcome of criminal litigation."[150]

Immediately after the *Simpson* decision it was rather difficult to see how the rule would be applied to Army procedure. In the Air Force and Navy cases there had been words spoken by the participants in the judicial process which the Court could censure and require to be corrected. But in the typical Army case the automatic reduction would never be mentioned on the record. It was difficult to see the authority by which the Court would invalidate an administrative process which was set into motion automatically when such a sentence was adjudged. The reduction would not be a part of an Army court-martial sentence. It would occur though not mentioned by the court-martial or by any reviewing authority. Therefore, if the Department of the Army had chosen to take the position that the Court has erred in the *Simpson* case, and had continued to let the automatic reduction provision function it is hard to imagine what the Court's mandate in any given case would be. It could not declare the sentence of the court-martial to be improper since the sentence would not mention reduction. It could not declare the convening authority's action or the board of review's opinion to be incorrect in law since that would not mention the reduction either. It would seem that the Court's only recourse would be to announce a holding to the effect that even though the inferior judicial proceedings were in all respects legal and proper, the decision would be affirmed only upon the condition that the accused was not at any future time administratively reduced as a result of the court-martial sentence, or that he be reinstated if he had already been so reduced. This sort of holding would seem to be quite unprecedented.[151]

---

[150] *Id.* at 232, 27 CMR at 306.

[151] In United States v. Littlepage, 10 USCMA 245, 27 CMR 319 (1959), the Army automatic reduction provision operated to reduce the accused before his case was presented to the Court of Military Appeals. The Court took notice of this occurrence and labeled the reduction "illegal" (citing Simpson). The Court's mandate was that the record of trial was returned to The Judge Advocate General for reference to a convening authority "for proceedings consistent with this opinion." However, there was other error which would, alone, have supported the same mandate.

However, the Army did not put the Court to a test of this hypothesis for it rescinded its regulations effecting automatic reductions and announced: "Reductions of enlisted members purportedly accomplished pursuant to paragraph 126*e*, MCM, 1951, on or after [the date of the *Simpson* case] . . . are invalid. . . ."[152] Therefore, if accused are to be reduced in grade during court-martial proceedings, this reduction must be accomplished by an express provision therefor in the Court's announced sentence.

Since the law officer has an affirmative duty to instruct the Court as to the maximum sentence which it may legally impose,[153] it seems clear that the Court may be instructed that it can reduce the accused to the lowest enlisted grade if it finds him guilty, and that it may do so even if it also imposes the maximum sentence otherwise authorized by the Table of Maximum Punishments. In most cases the court will no doubt make an appropriate reduction based on such an instruction. Assuming that courts expressly adjudge reductions which satisfy the Court of Military Appeals as being fair as a matter of law and satisfy Army administrators as being in the best interests of order, discipline, and efficiency, the *Simpson* ruling may offer little difficulty.

In those cases in which reduction is not expressly adjudged, the question arises whether the authorized commander can reduce the accused administratively for inefficiency based upon the incident, pursuant to paragraph 28*b*, Army Regulations 624–200. This regulation provides in pertinent part:

> "6. *Inefficiency.* Enlisted personnel may be reduced one or more grades for inefficiency by the commander of the organization to which they are assigned or attached if such commander has authority to appoint to the same grade from which reduced; or by a higher commander who has such authority. . . . For the purposes of this subparagraph 'inefficiency' is defined not only as technical incompetence, but also as any course of conduct affirmatively evidencing that the enlisted member concerned, whether a noncommissioned officer or enlisted specialist, lacks those abilities and qualities required and expected of a person of his grade and experience. In this respect, commanders may consider any act or acts of misconduct, whether or not such act also resulted in disciplinary action, as bearing upon the efficiency of the enlisted member concerned."

The Department of the Army has taken the position that this regulation is unaffected by the *Simpson* case.[154] The definition of inefficiency appears to be broad enough to support a reduction

[152] MSG DA 396465, 6 Mar 1959.
[153] United States v. Turner, 9 USCMA 124, 25 CMR 386 (1958).
[154] Note [152], *supra*.

based upon a court-martial conviction. Of course, the accused will likely argue that by using the regulation in this manner, the commander has intertwined it in the judicial process and used it illegally to increase the severity of his sentence. One problem such an accused will face relates to the forum in which he can make such an assertion. Assuming his case has been finally reviewed before he is administratively reduced, it is hard to see how he will present the issue to the Court of Military Appeals. Perhaps, he could bring suit in the Court of Claims for the amount of pay which the reduction has denied him.

The Air Force has not bowed so gracefully in this matter as has the Army. It has taken the position that while paragraph 126*e* may have been invalidated by the *Simpson* case so far as achieving a "judicial reduction" is concerned, that case can have no effect upon administrative reductions and paragraph 126*e* is still valid to achieve an automatic administrative reduction. It has asked the Comptroller General to determine whether the accused is entitled to pay in excess of the amount due to one in the lowest enlisted pay grade with his cumulative years of service, if paragraph 126*e* would reduce him to the lowest enlisted pay grade under the circumstances.[155] Thus, the Comptroller General is being asked if he will disagree with the Court of Military Appeals on its *Simpson* holding. Pending this decision and further developments in administrative reduction proceedings the law in this area remains unsettled.

5. *Punishments Assessable upon Rehearing or New Trial*

Certain limitations in addition to those discussed above attach when the court-martial is imposing punishment in a rehearing or new trial. In a rehearing or new trial, no sentence in excess of or more severe than the sentence adjudged by the original court-martial may be assessed.[156] Furthermore, paragraph 109*g*(2) of the Manual provides that the sentence on new trial shall not exceed the original sentence *"as approved or affirmed."* There is no such Manual provision as regards the sentence on rehearing. The holding in *United States* v. *Dean*[157] has imposed the requirement that the sentence upon rehearing shall not exceed the original sentence as approved by the convening authority, so new trial and rehearing procedures are similar to that extent. It has been sug-

[155] See DOD, Military Pay and Allowance Committee Action No. 243, 17 Apr 1959, by which the question was submitted to the Comptroller General.
[156] Art. 63*b* UCMJ, (rehearing); par. 109*g*(2), MCM, 1951 (new trial).
[157] 7 USCMA 721, 23 CMR 185 (1957).

gested that the *Dean* holding extends to require that no sentence in excess of that affirmed upon higher appellate review be adjudged upon rehearing,[158] *but the Court has not expressly so held.* Indeed, dictum in the recent *Simpson* case[159] suggests that the Court has retreated from its *Dean* position: "This was a rehearing. The maximum sentence that could be adjudged was that imposed at the previous trial. . . ."

The *Dean* decision rather clearly indicates that the Court does not intend that the sentence shall exceed that approved by the convening authority in the original trial. The statement in *Simpson* to the contrary was made in passing and is too perfunctory to be considered as representing a retreat from the *Dean* position. It is more logical to ascribe it to inadvertance. Perhaps it is logical to conclude that extension of the rule against increase of the sentence from that adjudged by the original court to that approved by the original convening authority indicates an intent by the Court to limit the sentence upon rehearing to that to which it is reduced on *any* level of appellate review. It is difficult to see the reason of limiting the sentence to that approved on the first level of appellate review but not on subsequent levels. But, on the other hand, the military rule is already more lenient than the civilian rule in federal and most state jurisdictions[160] and it is questionable whether the already liberal *Dean* holding should be extended unless the Court expressly prescribes such an extension. This it has not done.

The words "or affirmed" as used in paragraph 109(*g*)(2) might give the impression that the sentence upon new trial cannot exceed the original sentence as affirmed at *any* level of prior appellate review, thus equating new trial practice with the suggested extension of the *Dean* holding. However, the Legal and Legislative Basis, MCM, 1951, at page 160, states with reference to paragraph 109(g)(2), "Finally the sentence adjudged may not exceed the sentence adjudged upon the former trial." There is no mention of approval or affirmance. Therefore, the law as to maximum punishment remains unsettled in both the rehearing and new trial situations.

IV. CONCLUSION

In the past, problems relating to the maximum punishments which legally might be imposed by courts-martial were not gen-

[158] See JAGJ 1958/7850, 14 Nov 1958.
[159] United States v. Simpson, 10 USCMA 229, 232, 27 CMR 303, 306 (1959).
[160] See the *Dean* case at 7 USCMA 10, 23 CMR 188.

erally considered to be the most vital ones confronting the administrators of military justice. Perhaps, the reason was that almost any errors made by the court-martial with respect to the sentence could be corrected by intermediate appellate reviewing authorities without ordering a rehearing. Illegally severe sentences could be reassessed by the convening authority or the board of review. Inappropriately severe sentences could be mitigated by either of these authorities, or could be suspended by the convening authority. Sentences which imposed an improper type of punishment could be commuted by the Service Secretary.

However, the complexion of this matter has changed in recent years. It is still true that error by the court-martial in violating one of the established maximum punishments rules can be purged upon intermediate appellate review. But, in several recent cases, the court-martial did not err in violating the established rules, but rather, in following them. The errors which the Court of Military Appeals found was in the rules themselves rather than in the manner in which they were administered. When this sort of error invades the punishment imposing process, intermediate appellate reviewing authorities cannot purge error unless they have sufficient omniscence to anticipate which of the old rules may fall this time. This was true in the *Varnadore* case and in the *Simpson* case.

There is no doubt that these decisions create critical problems. The Judge Advocate General of the Army has characterized *United States* v. *Varnadore* as "The most significant change in the Manual during 1958."[161] *Simpson* may well receive the same distinction in 1959. As was indicated previously, it is still not clear how far the holdings of these cases may be extended.

Since this sort of error cannot be avoided by careful observance of the present rules and since it is very difficult to forecast the extensive effect the Court's invalidation of one of several interrelated rules may have upon the others, the question arises whether there is any way to avoid error resulting from the invalidation of previously accepted rules. To some extent, the Court's language may be helpful in indicating the sort of punishment rules it finds objectionable. But the decision in *Varnadore* invalidating one Manual provision certainly did not satisfactorily forecast what disposition would be made of related provisions. Else, the large

[161] Report of The Judge Advocate General of the Army, January 1, 1958, to December 31, 1958, at p. 43 of Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury.

body of case law relating to that question would not have arisen. The Court's language in *Simpson* does not indicate how far it will go in finding reduction in grade to be an improper *judicial* act rather than a proper *administrative* one.

There is no doubt that almost all of the problems involved in determining the permissible maximum punishments of convicted accused have arisen from the limiting provisions of the Manual. It may be argued, as the Army has so vigorously done, that these limitations are perfectly rational and proper and that it is the reasoning by which they are invalidated which is falacious. This argument usually has been supported by one Judge of the Court of Military Appeals.

On the other hand, perhaps the Manual provisions limiting punishments are unnecessarily complicated. Perhaps there should be no attempt to require that punitive discharge be adjudged when confinement or forfeitures exceed a certain amount. Perhaps there should be no attempt to require reduction upon adjudication of certain other punishments, or to permit a fine only when punitive discharge is also adjudged, or to deny the right to use the Table of Equivalent Punishments when a punitive discharge is also adjudged.

General courts-martial are usually composed of reasonable and intelligent officers who have a sound understanding of the problems of military discipline and a sincere concern for enforcement of that discipline. These court members are instructed in the law by a learned lawyer. As long as they are free under the Uniform Code of Military Justice to adjudge what they consider to be appropriate punishments and to combine or segregate the various types of punishment, they are very likely to arrive at a fair sentence without regard to the Manual limitations. If they do not, but err by punishing the accused too severely, intermediate appellate reviewing authorities can almost always correct the error without ordering a rehearing.

It is true that the inferior courts-martial usually are manned by less experienced officers who are more likely to need guidance than are those serving on general courts. Also, the entire proceedings may be conducted without benefit of legal advice. However, most error which has thus far arisen in this field has involved interpretation of the more complex limitations upon more severe punishments sought to be imposed by general courts-martial. The clear jurisdictional limitations upon inferior courts render it unnecessary that they refer to many of the Manual rules

which are here suggested to be unnecessary. Furthermore, all of the above-mentioned devices for purgation of error by intermediate appellate reviewing authorities are available in these inferior court cases.

The myriad rules of the Manual are confusing in their number, if for no other reason. More than a few of them are ambiguous, as has been demonstrated in the body of this discussion. Many of these ambiguities have yet to be resolved and, therefore, stand as pitfalls to trap future courts. If the Manual limitations upon the imposition of punishment were greatly reduced in scope and number, much potential error arising from their misinterpretation or from their inherent invalidity in the eyes of the Court of Military Appeals might be avoided.

COMMENTS

ANTICIPATORY REPUDIATION — CONTRACTING OFFICERS' DILEMMA: Anticipatory repudiation of a contract occurs when a promisor, without failing to render a promised performance himself or preventing performance by the promisee, and while there is yet performance due from the promisee, shows the promisee by word or deed that he is unwilling or unable to render a promised performance not yet due.[1] The notion is that upon entering a bilateral contract the parties have created a relationship which each impliedly promises not to prejudice.[2] It has been suggested that the anticipatory repudiator breaches a present implied duty not to dissuade the promisee from performing his obligations under the contract.[3] Anticipatory repudiation or anticipatory breach amounting to a total breach may take place prior to the time when any performance of the contract is due from the repudiator or it may occur after the repudiator has performed a part of his contract.[4]

The doctrine of anticipatory breach or repudiation, however, does not apply where the promisor has failed to perform a contractual duty when the time for performance has arrived. In this situation, the promisee may or may not have an immediate right to avoid the contract depending upon whether the breach is total or partial.[5] But the conditions surrounding recovery under the doctrine of anticipatory breach or repudiation, for example, that the contract not be a bilateral one which has become unilateral by full performance on one side,[6] have no place in this context. Of course, a breach which otherwise might be considered partial is when accompanied by a repudiation usually considered total.[7] The theoretical line of distinction between the breach of a present duty and anticipatory breach or repudiation has not always been preserved. As Mr. Justice Cardozo observed:[8]

---

[1] *Reinstatement, Contracts* §318 (Supp. 1948), 5 Williston; *Contracts* §1296, (2d Ed., 1937).

[2] Hochster v. De La Tour, 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853).

[3] Ferson, *Breach of Contract: Elements, Degrees and Effect*, 24 U. Cin. L. Rev. 1, 15 (1955). See also Roehm v. Horst, 178 U.S. 1, 19 (1899); Uniform Commercial Code, secs. 2–609, 2–610.

[4] Central Trust Co. v Chicago Auditorium, 240 U.S. 581 (1916). *Cf.* Pennsylvania Exchange Bank v. U.S., 170 F. Supp. 629 (Ct. Cl., 1959), DA Pam 715–50–46, par. 9.

[5] See 12 Am. Jur., *Contracts* §§389, 391 (1938).

[6] See Annot., 105 A.L.R. 460 (1936).

[7] Corbin, *Contracts*, §954; 5 Williston, *Contracts* §1317, (2d Ed., 1937).

[8] New York Life Ins. Co. v. Viglas, 297 U.S. 672, 681 (1936).

> ". . . . Strictly an anticipatory breach is one committed before the time has come when there is a present duty of performance. . . . It is the outcome of words or acts evincing an intention to refuse performance in the future. On the other hand, there are times . . . when the breach of a present duty, though only partial in its extension, may confer upon the injured party the privilege at his election to deal with the contract as if broken altogether. A loose practice has been growing up whereby the breach on such occasions is spoken of as anticipatory, whereas in truth it is strictly present, thought with consequences effective upon performance in the future."

In government contracts, a situation to which the doctrine of anticipatory breach or repudiation would seem to be peculiarly fitted is that where the Government has an urgent need for supplies and establishes a firm delivery schedule. In the event that the contractor, before any delivery is due, makes "a positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties," a total breach has occurred,[9] and the contracting officer should be able to terminate the contract immediately and reprocure the needed supplies. The wording of the standard Defaults article for fixed-price supply contracts, however, casts some doubt upon the validity of this procedure. The article,[10] in part, provides:

> "(a) The Government may . . . by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:
>
> (i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
>
> (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days . . . after receipt of notice from the Contracting Officer specifying such failure."

Assuming that an anticipatory breach or repudiation may be equated to a failure to perform "other provisions of this contract" or to such failure "to make progress as to endanger performance of this contract" under (a) (ii), a minimum delay of ten days is required before the contract can be terminated.[11] Further, the language of section (a) (i) would seem to limit terminations thereunder to cases of breach of present duty where the contractor has failed to deliver supplies on time.

---

[9] *Restatement, Contracts*, §318 (1932).
[10] ASPR 8–707 (5 Sep 1958).
[11] Cf. Uniform Commercial Code, §2–609(4).

The Armed Services Board of Contract Appeals has considered the relationship of the doctrine of anticipatory breach to terminations for default under section (a) (i) on at least four occasions. In *Cowan Company*, ASBCA No. 2373 (28 Feb 1955), DA Pam 715–50–1, p. 223, par. 11, the contractor agreed to deliver 360 bags of urgently needed potatoes to the Army at a specified hour and date. The contracting officer, when informed by the contractor that delivery on schedule would be impossible, terminated the contract for default under section (a) (i), three hours before the time specified for performance. This action, along with an assessment of excess costs incurred in the reprocurement, was disapproved by the Armed Services Board of Contract Appeals for the reason that section (a) (i) did not authorize the termination for default on the ground of anticipatory breach. In *The Aircraftsmen Company*, ASBCA Nos. 3592 and 3965 (26 Mar 1958), DA Pam 715–50–28, par. 5, and *Greenstreet, Inc.*, ASBCA No. 3137 (9 Feb 1959), a different conclusion was reached on substantially different facts: (1) the time for initial performance had arrived, (2) the contractor had failed to meet a firm installment delivery schedule, and (3) before final deliveries were due, the contractor notified the contracting officer that financial difficulties prevented completion of the contract. In both decisions, the Armed Services Board of Contract Appeals approved the contracting officer's termination for default even though the final delivery date had not been reached.

In *Aircraftsmen*, the reason apparently assigned was the contractor's anticipatory breach or repudiation. The board did not decide whether or not the contractor's failure to deliver installments on time by itself warranted termination under (a) (i), there being a question whether the delivery schedule was waived. The case, therefore, does not exemplify the confusion discussed by Mr. Justice Cordozo in *Viglas, supra*. It does, however, stand for the proposition that, if the contracting officer advises the contractor in the notice of termination that anticipatory breach or repudiation is being relied upon, the right to terminate is immediate, that is, no ten-day notice is required. It also seems that the contracting officer must avoid specific reference to (a) (i), although the logic of such avoidance is not entirely clear. *Aircraftsmen*, then, may be regarded as a case properly for the application of anticipatory breach or repudiation principles.

In *Greenstreet*, however, the board concluded that termination under (a) (i) was justified because of the failure to make installment deliveries on time. In such circumstances, although the fail-

ure to make an intermediate delivery may have future effects, the doctrine of anticipatory breach or repudiation is not applicable. Nonetheless, the majority of the board in *Greenstreet* resolved the dispute on anticipatory breach or repudiation principles, the concurring members agreeing on the result but not on the theory. It is suggested that the majority members fell into the confusion noted in *Viglas, supra.*

In *David R. Levin, Tr. In Bankruptcy for Rosedale Dairy Co., Inc.*, ASBCA No. 5077 (21 Jan 1959), the contractor agreed to make daily deliveries of milk to Fort Story, Virginia. After the contractor had performed a part of the contract in satisfactory fashion and before it had breached any term of the contract, it notified the contracting officer that the next day's delivery would be its last. This was necessary because the state was about to cancel the contractor's license for failure to pay suppliers on time. On the basis of this information and without taking formal action, the contracting officer treated the contract as terminated, entered into a contract for the remainder of the Government's requirement with another dealer, and assessed the excess costs of reprocurement against Rosedale Dairy. The board found that the contractor's notification that it could not complete the contract because a license essential to its continued operation was being revoked constituted an anticipatory repudiation of the remainder of its contract, citing *Aircraftsmen.*

Levin is like *Aircraftsmen* and unlike *Cowan* in that the anticipatory repudiation or breach took place after the contractor had partially performed. It is not shown in the report whether the contracting officer avoided specifically relying on (a) (i) or whether he advised the contractor that the termination for default rested on principles of anticipatory breach or repudiation, both of which were required by *Aircraftsmen.*

Two conclusions are permissible. The first is that the board will permit the contracting officer to terminate for default for anticipatory breach or repudiation without the necessity of a ten-day notice if the repudiation occurs after performance by the repudiator has begun, *Aircraftsmen* and *Levin,* but not if it occurs before any performance by the repudiator is due, *Cowan.* This conclusion has little to recommend it. The doctrine of anticipatory breach or repudiation finds sophisticated enunciation in cases where the repudiation preceded the time for performance.[12] The

[12] Hochster v. De La Tour, note 2, *supra.*

need of the promisee to be secure in his bargain is as great before performance by his promisor as it is after the latter has begun to perform.

The second permissible conclusion is that *Cowan* no longer represents the law which will govern the board. The doctrine of anticipatory breach or repudiation, fashioned by the Queen's Bench in 1853 to meet the necessities of the commercial community, is no less necessary today in contracts between the Government and private contractors. This necessity seems to have been recognized by the board. That, in so doing, it has been unable to rely on the words set forth in the Defaults article[13] but has yet retained jurisdiction over the matter merits no criticism. Lt. Col. RUSSELL N. FAIRBANKS* and Lt. RICHARD E. SPEIDEL.**

[13] ASPR 8–707 (5 Sep 1958).

*Member of faculty of The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia; member of District of Columbia Bar; graduate of Columbia University Law School.

**Member of faculty of The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia; member of Ohio State Bar; graduate of University of Cincinnati Law School; LL.M., Northwestern University Law School.

BOOK REVIEW

The United States and the Treaty Law of the Sea. By Henry Reiff. Minneapolis: University of Minnesota Press, 1959. Pp. 451. Index.

Whether he be nautically inclined or not the international lawyer has followed with close attention the recent United Nations Conference on the Law of the Sea concluded at Geneva on 28 April 1958. It may well be that the four international conventions which that conference produced will portend the route by which sovereign states are to adjust their diverse economic and social values in an ever-merging world community. The validity of a theory that international legislation is an efficient and satisfactory route to a universal public order can, in part, be tested by an appraisal of past successes and failures. Thus, Professor Reiff has rendered a service to social scientists and lawyers alike by making available a highly interesting and informative account of the participation by the United States in multilateral treaties regulating the workaday use of the sea.

When he focuses on the sea (Chap. I), he sees far more uses and abuses of it than some readers may expect (Chap. II). There is its challenge to transportation—under the sea, tunnels, pipelines, and cables; on the sea, ships and boats; and over the sea, bridges and aircraft. There is its role in international communications—postal and radio. There is its function as a supplier and sustainer of natural resources—fish, birds, minerals, sand, fresh water, and, potentially, energy. There is also its function as a great receptacle for the deposit of much of the world's waste. And, finally, there is its contribution to recreation—yachting, fishing, and underwater exploration (skin-diving). So broad a vision is calculated to attract the interest of any lawyer who accepts law, maritime and aviation law, particularly, as a body of rules regulating factual conditions. Professor Reiff's thorough and readable documentation of the physical facts of the sea around us (apologies to Rachel Carson) and the facts of United States practice should make it clear, if ever it required clarification, that the law of the sea is essentially a compromise between conflicting economic interests; those of small littoral states and those of large maritime powers.

The author separates the sea-treaty activities of the United States (and some air-treaty activities as well) into three chronological groups—from the Revolutionary War to World War I

(Chap. III), between the two world wars (Chap. IV), and subsequent to World War II (Chaps. V, VI). This time-capsule approach makes, of course, for a disconnected treatment of each activity. Considerately, an excellent table of contents and index makes it a simple matter to trace the development of a particular activity through the three time groups.

Especially helpful to the maritime lawyer is the author's detailed discussion of the growth of international rules for the safety of life at sea (including an account of the *Andrea Doria-Stockholm* collision and investigation), and his discussion of the movement and forces which seek to regulate sea-going labor on an international scale. The controversial subject, "flags of convenience," is given some treatment but not enough to suit the perhaps singular preference of this reviewer. All will gain from his discussion of existing and potential maritime problems involved in the detonation of atomic weapons and the use of nuclear-powered vessels.

Appendices set out both of President Truman's 1945 proclamations (continental shelf and coastal fisheries), a subject-matter listing of the treaties cited, and an impressive bibliography.

His conclusion (p. 372) focuses on the United Nations as the hope for a better organized and disciplined use of the sea. At the risk of being unorthodox, this reviewer perceived a more stimulating statement of the challenge for the future in the following brief paragraph which appears almost at the beginning of the book (p. 20):

> "What matters most in this period of changing law relating to use of the sea is acceptance of national self-restraint, a decent regard for the legitimate national interests of other states, and a disposition to share control in the common interest wherever that is feasible or reasonably necessary. Crass national monopolies, unmindful of the legitimate interests of other states or destructive of the *res* involved, would have no status under this view of the common interest. They would but sow the seeds of future wars."

Mutual forbearance among nations, here as elsewhere, will produce salutary results with or without United Nations sponsorship. No doubt Professor Reiff will agree. It certainly can be agreed that his is a book well worth the reading.

DWAN V. KERIG*

*Member of faculty, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

ADDENDUM

Since the publication of the article, "History of The Judge Advocate General's Corps, United States Army," 4 Military Law Review 89 (Department of the Army Pamphlet No. 27–100–4, April 1959), attention has been called to two errors of omission. The article should have stated, at Note 92, that the Title 10 codification project, initiated in March 1948, was directed for the first two and a half years by Colonel Alfred C. Bowman, JAGC, and that Dr. Frederick Reed Dickerson, now Professor of Law at Indiana University, was associated with Colonel King in the direction of the later stages. The article also should have stated, in Note 94, that the revision of FM 27–10 was edited by Major Richard R. Baxter, JAGC, now Professor of Law at Harvard University.

By Order of *Wilber M. Brucker*, Secretary of the Army:

L. L. LEMNITZER,
General, United States Army,
Chief of Staff.

Official:

R. V. LEE,
Major General, United States Army,
The Adjutant General.

Distribution:

To be distributed in accordance with DA Form 12 requirements.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959—520514

☆ U. S. GOVERNMENT PRINTING OFFICE : 1960 O - 570482 (3265)